Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-405**

GEORGE H. LUSTIG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, GEORGE H. LUSTIG, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 15, 1977. Petition for Rehearing En Banc denied August 12, 1977.

I. OPINION BELOW.

The opinion of the Ninth Circuit, in *U.S. v. Lustig, et. at.*, Slip Opinion No. 1260, No. 76-2661, _____ F.2d _____, (June 15, 1977). Rehearing En Banc denied August 12, 1977, is not yet reported; a copy is attached as Appendix A. No District Court opinion was reported; any written memorandum decisions are reproduced as Appendix B.

II. JURISDICTION.

The opinion in the Court of Appeals was entered June 15, 1977. A timely Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc, filed June 30, 1977, was denied August 12, 1977. Jurisdiction is invoked under 28 U.S.C. 1254 (1). The instant Petition is timely under Supreme Court Rule 22 (2), since filed within thirty days after entry of final judgment.

III. QUESTIONS PRESENTED FOR REVIEW.

A. Whether the Denial of the Protection of the Common Law Marital Privilege and the Federal Marital Privilege Under Rule 501 as to Mr. Lustig's Common Law Wife Violated His United States and Alaska Constitutional Rights to Due Process, Equal Protection, and Privacy?

B. Whether Instructing the Jury that "Very Little Evidence is Necessary to Show that a Particular Defendant was a Part" of a Conspiracy Violated the Right to Proff Beyond Reasonable Doubt as to Each Element of an Offense as Mandated by the Due Process Clause of the Fifth Amendment?

C. Whether the Freezing of All of the Defendant's Assets and the Denial of a Severence or Reasonable Continuance to Enable Petitioner's Counsel of Choice to Investigate, Prepare, and Subpoena Witnesses Denied the Sixth Amendment Rights to Counsel, Cross-Examination, Confrontation, and to Call Witnesses?

D. Whether the Warrantless Search of an Opaque Parcel

Seized From Mr. Lustig's Vehicle Absent Probable Cause or the Necessity for an Inventory Search, Violated the Rights to Privacy and Freedom From Illegal Search and Seizure Under the United States and Alaska Constitutions, *United States v. Chadwick*, 97 S.Ct. 2476, 45 L.W. 4798, (6/21/77) and *South Dakota v. Opperman*, 428 U.S. 364 (1976), Where the Search Occurred at Police Headquarters?

E. Whether the Refusal to Allow Cross-Examination as to Motive for Bias and the Denial of a Two Hour Continuance to Enable the Petitioner to Confront and Cross-Examine the Source of Damaging Hearsay Statements and to Produce Evidence of Bias, Violated the Sixth Amendment Rights to Confrontation and to Call Witnesses?

F. Whether the Refusal to Allow an Individual Poll as to Each Count of a Multiple Count Indictment Where the Petitioner had Admitted All the Elements of One Count, Violated the Constitutional Right to a Jury Trial?

G. Whether the Arbitrary Refusal of the Right to be Present, or a Record, at a Communication by the Trial Judge with a Juror, and the Excusal of Said Juror, Violated the Right to be Present, the Right to Due Process, and the Right to a Jury Trial?

IV. CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED.

This case involves the due process clause of the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, the warrant clause and unreasonable search and seizure clause of the Fourth Amendment, the right to counsel, confrontation, and witness clause of the Sixth Amendment, and the right to privacy from the First, Fourth, and Ninth Amendments to the U.S. Constitution. Rule 501, 603, 605 of the Federal Rules of Evidence, and Rules 26, 31, and 43 of the Federal

Rules of Criminal Procedure are involved, as well as Article 1, §14 and §22 of the Alaska Constitution, 18 U.S.C. 3164 (Speedy Trial Act), 21 U.S.C. 846 (conspiracy), AS 25.05.011, 25.05.261, 25.05.311 (Alaskan common-law marriage), and 13 A.A.C. §2.375 and 2.350 (Alaskan impound law). The pertinent text of each is set forth in Appendix C.

V. STATEMENT OF THE CASE.

The Petitioner, George H. Lustig, is serving fourteen years pursuant to jury convictions for distribution of a controlled substance (cocaine), in violation of 21 USC §841(a), and conspiracy to distribute a controlled substance (cocaine), in violation of 21 USC §846.[1]

Mr. Lustig was charged in a superseding indictment on March 24, 1976, with co-defendants Gregory D. Pederson and Cheryl Rae Pederson.[2]

1. Mr. Lustig received 9 years incarceration for the instant convictions, and five years incarceration, to be served consecutively, in a probation revocation proceeding in *U.S. v. Lustig*, No. A 115-73 Cr., (U.S. Dist. Ct., AKA.) (September 15, 1976), based on the conviction and alleged conduct in the instant proceeding. The revocation and sentence were appealed to the Ninth Circuit, and affirmed in *U.S. v. Lustig*, slip. Op. No. 1277, No. 76-3146, _____ F.2d _____ (June 15, 1977). Petition for Rehearing En Banc denied August 12, 1977. A Petition for a Writ of Certiorari with regard to said opinion is being filed simultaneously with the instant Petition, and the Court is respectfully requested to take judicial notice of said Petition and the record below.

2. The co-defendant Gregory D. Pederson, filed a Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, on the 18th day of July, 1977, with regard to *U.S. v. Pederson*, slip. Op. No. 1260, _____ F.2d _____ (9th Cir. 6/15/77) with regard to the instruction that very little evidence is necessary to show that a particular defendant was a part of a conspiracy. Said Petition, Case No. 77-5118, is still pending before this Court. The appeal of Cheryl Rae Pederson, in *U.S. v. Cheryl Rae Pederson*, No. 76-2725 is still pending in the Ninth Circuit with regard to the questioned instruction and other points.

After posting bail in the instant proceeding, Mr. Lustig was rearrested on a Petition to Revoke Probation and held without bail, in a substandard pretrial detention facility, severely hampering his efforts to obtain counsel. All of his assets were frozen by an injunction issued against transferring or encumbering said assets.

Despite the difficulties engendered by the frozen assets and the conditions of incarceration, Mr. Lustig, after substantial effort, obtained counsel of choice four days before trial. The trial judge, mistakenly believing that he was bound by a rigid reading of the Speedy Trial Act, 18 USC §3164, denied repeated motions for continuance, or severance, and the Ninth Circuit Court of Appeals denied an Application for Writ of Prohibition.[3]

Mr. Lustig's original counsel, after entering a limited appearance for purposes of arraignment, moved to withdraw due to non-availability of his partner, whom Mr. Lustig initially expected to retain, and due to a conflict with Mr. Lustig. The record is replete with references to the difficulty Mr. Lustig encountered obtaining counsel of choice, and the conflict existing between Mr. Lustig and his initial attorney.

The evidence against the Petitioner was largely circumstantial. At his arrest, the police seized a brown paper bag containing a scale and a "seal-a-meal" machine tied by scientific evidence to the bags of cocaine sold by the co-defendant Pederson to an undercover officer. The "seal-a-meal" machine was discovered in a search of the opaque brown paper bag at

3. Entitled *George H. Lustig v. The Honorable James Von Der Heydt*, filed 4/26/76 (9th Cir. No. 76-1919). (Denied, 4/26/76). An Appeal from Order Respecting Conditions of Release, in A 115-73 Cr. was filed in the Ninth Circuit on 4/26/76 and denied after the trial as being moot. (R. A 115-73 Cr. at 323-369).

police headquarters, after said bag was seized from Mr. Lustig's truck, despite the fact he had friends standing by to move the vehicle, as is his right under the applicable Alaska Statutes governing the State Troopers making the arrest.

The most damaging testimony was given by his common law wife, Callie Newton Lustig, who had lived with him in a common-law marriage for seven years and bore him two children. She testified over objection, she had personally used the "seal-a-meal" machine to bag cocaine, and sold cocaine at George's direction, "taking care of business" while he was hospitalized. The District Court, and the Ninth Circuit, both incorrectly held Rule 501, of the Federal Rules of Evidence, is governed by State law and both incorrectly held that in Alaska, AS 25.05.011, 25.05.261, and 25.05.311, totally prohibit common law marriage.

The District Court denied a hearing on whether the Lustig/Newton common law relationship had been terminated with no chance of reconciliation, and the Court of Appeals made a *de novo* finding an irreconcilable termination had occurred, to defeat the equal protection aspects of the "anti-marital facts" privilege.[4]

Both the District Court and the Court of Appeals incorrectly held that no confidential communications had been revealed.

The primary reason for Callie Newton Lustig's testimony and bias, was a lesbian relationship existing between herself and Phyllis Resnek, a police informant. The court restricted cross-

4. Both the District Court and the Court of Appeals were aware Callie Newton Lustig had served Mr. Lustig with a "common-law divorce" complaint asking for custody of the children and one half of his property only a few days prior to trial, that no final decree has yet been entered in said action, and that negotiations with regard to reconciliation were, and are still, ongoing between Mr. Newton Lustig and Mr. Lustig.

examination of Callie as to bias, and refused a two hour continuance to enable the defense to subpoena Phyllis Resnek to establish said bias, and further to confront and cross-examine the source of 27 phone calls made by Ms. Resnek to the police to the effect that Mr. Lustig was a "big fish" in dealing drugs.[5]

The trial court refused confrontation of the informant Tarnef, who had purportedly identified Mr. Lustig as being at the scene of one of the sales, and had linked his name to the conspiracy, as to whether he was currently under investigation or charges, with respect to the felony murder of a local policeman, arson, perjury, or narcotics.

On the second day of testimony, the trial judge informed counsel in chambers that he had met ex parte with one of the jurors, and had decided to excuse him. Despite repeated demands for an evidentiary hearing, and the right to be present at any further questioning of the juror, the Judge further examined the juror in chambers without a record, and excused him in the absence of Mr. Lustig or counsel.[6] No exigent circumstances existed.

The jury was instructed, over objection, that:

> "Once a conspiracy is shown to exist, very little evidence is necessary to show that a particular defendant was a part of it. Slight evidence is enough.... (Certified Record 537).

5. Callie Newton Lustig was induced to testify by "relay" of information from Lee Peterson, a former United States Attorney to Phyllis Resnek, to Callie, to the effect that Mr. Lustig purportedly "implicated" Callie in his defense. Note that in fact Tarnef, another government informant, implicated Callie.

6. While the opinion incorrectly indicates that the alternate juror seated was approved by the defendant, in fact, said alternate was not so approved. Peremptory challenges as to the alternates were exhausted, and the defense reserved one peremptory challenge as to the main trial jury to avoid seating the juror, Mrs. Scott, who was the alternate eventually seated over objection.

Although Mr. Lustig admitted Count V (possession) of the multiple count indictment, an individual poll as to each juror as to each count was denied.

By court order, Mr. Lustig has been prohibited from contacting the juror interrogated ex parte by the Judge, or contacting the other jurors as to whether said juror communicated any alleged bias.

The civil suit filed by Mr. Lustig's common-law wife asking for a "common-law divorce" remains pending. Mr. Lustig's assets remain frozen. Mr. Lustig remains incarcerated.

This Petition for Writ of Certiorari Follows.

VI. REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Common Law Marital Privilege and Equal Protection, Due Process, and the Right to Privacy.

The opinion holds: (1) Under Rule 501 of the Federal Rules of Evidence the "anti-marital facts" privilege is controlled by state law and Alaska state law totally prohibits common-law marriage; (2) The common-law marriage had been "terminated with no chance of reconciliation"; (3) None of the testimony of the defendant's common-law wife reveal confidential communications. *U.S. v. Lustig*, supra, at 1271-1273.

At Footnote 11, the opinion concedes the existence of a common-law marriage in accordance with common-law principles.

1. The Newton/Lustig Marriage has not Been Terminated.

The Newton/Lustig Complaint was filed two days prior to the

trial, they had separated five months prior to his arrest, after seven years of marriage. They have two children. (Tr. 1963-1965).

Mr. Lustig repeatedly demanded that a showing be made outside the presence of the jury as to termination. (Tr. 1926, 1927, 1932, 1933). The Court was aware negotiations for reconciliation were still in progress.[7]

After refusing a hearing, the trial Judge failed to make findings as to termination of the marriage, and the Ninth Circuit made said findings *de novo* on appeal, unsupported by the record below.[8]

2. Callie Newton Lustig Violated Confidential Communications.

As reflected by the record, she claimed she was merely "taking care of business" for George while he was in the hospital. (Tr. 1955, 1967), she had left due to discussions over drug dealing (Tr. 1957, 1966), she was selling drugs to Mr. Lustig's

7. "...there also has to be a showing that the marriage is disintegrating. *There still has to be a showing.* Bring the lady in here and let us hear her testimony. *There are still negotiations going on between myself and Mr. Peterson in terms of trying for a reconciliation...and we are not at the state where there is complete disintegration of marriage. It is not totally disintegrated. The government is contributing to that* to bring this lady in and put her on the stand." (Tr. 1932) (E.A.)

8. No final decree has been granted by the State Court in the suit for dissolution of the marriage, assets, and child custody by Callie Newton Lustig; negotiations as to reconciliation are still ongoing and in pre-trial stages. For the other cases dealing with the termination of a marriage prior to trial by divorce, see *Cooper v. U.S.*, 282 F.2d 527 (9th Cir. 1966), *Brodskey v. U.S.*, 339 F.2d 180, 182 (9th Cir. 1964), *U.S. v. Crockett*, 534 F.2d 589, 604 (5th Cir. 1976), *U.S. v. Burks*, 470 F.2d 482 (D.C. Cir. 1972) (termination by death), *Volinitias v. Immigration and Naturalization Service*, 352 F.2d 766, 768 (9th Cir. 1965), *U.S. v. Ashby*, 245 F.2d 684, 686 (5th Cir. 1957), *Hoss v. Purinton*, 229 F.2d 104 (9th Cir. 1955), *Yoder v. U.S.*, 80 F.2d 695 (10th Cir. 1935).

customers due to communications by Mr. Lustig while he was in the hospital (severely burned and under heavy medication) as to hospital bills he was incurring. (Tr. 1950, 1961, 1969, 1970, 1971, 1994, 1996, 1997, 2004, 2014), prior to her leaving him. (Tr. 1965).

3. The Court of Appeals has Decided the Important State Question of the Protection Afforded Common-Law Marriage Under the Constitutional Rights to Equal Protection and Privacy in Conflict with Applicable Alaskan Law.

The opinion makes a broad holding that common-law marriage is invalid under Alaskan law, citing AS 25.05.011, 25.05.261, and 25.05.311.

In fact, these are essentially "property statutes", limited by the Alaska Supreme Court, on an equal protection analysis. In *Burgess Const. Co. v. Lindley*, 504 P.2d 1023 (AK 1972), the court indicated a distinction between a legal spouse and a common-law spouse via the workmen's compensation statute, AS 23.30.215, would violate Article 1, Section 1, of the Alaska Constitution [equal protection].[9] Justice Erwin, concurring, stated:

> "*I find the statutory grant of workmen's compensation benefits to a legal wife and not to a common-law wife, is a violation of Article 1, § 1, of the Alaska Constitution which guarantees all persons equal protection under the law.* Such classification constitutes impermissible discrimination that would deny benefits under AS 23.30.215 (a) (2) [Workmen's compensation statute] solely because a 'spouse' did not go through a formal marriage ceremony. Id. at 1026. (E.A., footnotes omitted)

9. See also *Hager v. Hager*, 558 P.2d 919 (AK 1976) (AS 04.55.210 (6), (statutory division of marital property as applied to common-law marriage), AS 11.35.010 (obligation of child support), AS 11.35.100 (illegitimate children of both parents), AS 13.11.045 (inheritance through mother and father if acknowledged), AS 20.15.040 (consent of both parents for adoption).

The Alaska Constitution provides:

> *The right of the people to privacy is recognized and shall not be infringed.* The legislature shall implement this section. Article 1, §22. (E.A.)

The Alaska Supreme Court has declared the intimate relationships of its citizens will not be breached or intruded upon absent a compelling state interest. *Ravin v. State*, 537 P.2d 494 (AK 1975), *Gray v. State*, 525 P.2d 524 (AK 1974); see also *Breese v. Smith*, 501 P.2d 159 (AK 1972) (Right to privacy, and right to be left alone).

4. The Court of Appeals Opinion Decides the Important Question of the Scope of the Federal Marital Privilege in Conflict with Applicable Decisions of the U.S. Supreme Court, and Federal Statutes which Establish a Common-Law Marital Privilege that Exists Until a Marriage is Terminated by Divorce Through Judicial Decree.

Under Rule 501, the Federal Courts are not constrained to apply state law with regard to privileges in criminal matters. *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975), held:

> In determining the Federal law of privilege in a *federal question case ...the rule ultimately adopted, whatever its substance, is not state law but federal common law.* (citation omitted) (emphasis added).

The legislative history of Rule 501, 10 demonstrates that while Congress did, while rejecting Article V (privileges) as promul-

10. See: AM Jur 2d. New Topic Service, Federal Rules of Evidence, Paragraph 501.2 at No. 56; H.R.No. 93-650 93rd Cong. 1st Sess., 8-9 (1973) S.R. Op. No. 1277, 93rd Cong. 2nd Sess., 6-7, 11-13 (1974); H.R. Cong. Rep. No. 1597, 93rd Cong. 2nd Sess, 7-8 (1974); U.S. Cod. Cong. and Admin. News 1974, page 7098. See also, the remarks of Congressman Hungate, Chairman of the House Judicial Committee on Criminal Justice, stating that Rule 501 was "not intended to freeze the law of privileges as it now exists", appearing at 120 Cong. Rec. H. 12254 (1974), and Joint Explanatory Statement of the Committee of Conference, page 7, on 501, "*Both the House and Senate bills provide that federal privilege law applies in criminal cases*" (emphasis added).

gated by the U.S. Supreme Court, refuse to deliniate non-constitutional privileges, the intent was "...the courts should continue to develop the federal common-law on a case to case basis." *Lewis*, supra at footnote 4.

The cases cited by the decision for the proposition that state law controls are not applicable. *U.S. v. Apodaca*, 522 F.2d 568, 571 (10th Cir. 1975), deals with sham marriage, (citing *Lutwak v. U.S.*, 344 U.S. 604). *U.S. v. Neeley*, 475 F.2d 1136, 1137 (4th Cir. 1973), interprets the Virginia privileged communications, Va. Code Ann. ¶8-289 (1957). *U.S. v. McElrath*, 377 F.2d 508, 510 (6th Cir. 1967) treats bigamy.

In *Hawkins v. U.S.*, 358 U.S. 74 (1959), the Court established a marital privilege for purposes of federal common law. In *Lutwak v. U.S.*, 334 U.S. 604, 615 (1953), the Court recognized the reason for the privilege is to "*Protect the sanctity and tranquility of the marital relationship*". (E.A.)[11]

In 1959, Justice Black, speaking for the Court, stated:

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace not only for the benefit of husband, wife and children, but for the benefit of the public as well...much more bitterness would be engendered by voluntary testimony than that which is compelled...*(while) the fact a...wife testifies against the other voluntarily is strong indication that the marriage is already gone...Not all marital flare-ups in which one spouse wants to hurt the other are permanent.* ...The wide-spread success achieved by courts throughout the country in conciliating family

11. See also; 8 Wigmore on Evidence ¶2228 (policy to preserve chances of reconciliation), "The Husband and Wife Privileges in Federal Criminal Procedure" 24 Ohio St. L. J. 144, 152 (1963), and "Policy, Privacy and Perogatives: A Critical Examination of the Proposed Federal Rules of Evidence as they Effect Marital Privilege", Calif. L. R. Vol. 61: 1353 (1973).

differences is a real indication *that some apparently broken homes can be saved provided that no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage. Hawkins v. U.S.*, supra., at 358 U.S. 77-79. (E.A.)

While *Pereria v. U.S.*, 347 U.S. 1,6 (1964) held that divorce terminated the privilege; merely filing a complaint is not sufficient. Without a final judicial decree of divorce, there is a presumption reconciliation is possible, and the government should not force an irresistable "wedge" between the parties.[12] *U.S. v. Smith*, 533 F.2d 1077 (8th Cir. 1966) indicates clearly the couple was divorced prior to trial. *U.S. v. Fisher*, 518 F.2d 836, 838 (2nd Cir. 1972), involved a final divorce decree, with an appeal pending.[13]

4. The Opinion has Decided Important Federal Questions by Denying Equal Protection, the Right to Privacy, or the Protection of Rule 501 to the Petitioner's Common-Law Marriage and the Issues have not Been, but Should be, Settled by this Court.

The opinion denies the shield of equal protection, privacy, or Rule 501 to a marriage valid at Federal common law. Said protections are denied if a state in some manner prohibits common-law marriage. This issue has never been settled by the

12. "After the great cause of the dissolution...has come to pass, and *the parties are not only alieniated in spirit, but also solumly freed by judicial decree*...(the privilege would cease). 8 Wigmore, supra at ¶2227. (E.A.) See also *Hendrickson v. Harry*, 200 Mich. 41, 164 N.W., 393, 166 N.W. 1023, 1917 (wife cannot testify during pendency of divorce action; allowed to testify once the divorce is final) *Moss v. Moss*, Q.B.D. (1963) All E.R. 829 (England) (husband cannot testify during period of judicial separation.

13. The *Fisher* court distinguished *Hawkins*, supra, by noting Fisher had no children by the witness, had two children by another woman, and had not lived with the witness for eleven years and actually had been granted a divorce on his own motion and testimony. *Fisher*, supra, at 518 F.2d 840.

Court, and is one of great importance which is likely to reoccur on a wide-spread scale throughout the lower courts such that the Court should give definite direction; to protect common-law marriage from the type of invasion reflected by the record in this proceeding.[14]

It is manifest that a substantial portion of the marital relationships now ongoing in the United States are common-law.[15]

The Court has previously applied an equal protection analysis to prevent discrimination against illegitimates, and other persons who by choice or necessity choose to live outside of the strict moral dictates of society. In *Levy v. Louisana*, 391 U.S. 68, (1969), the Court held that a state could not deny recovery for wrongful death in a court action to the illegitimate offspring of a mother, since the classification of the illegitimacy of the child is not a rational basis for the purpose of the statue and therefore denys equal protection. In *Labine v. Vincent*, 401 U.S. 532, (1971), the Court upheld Louisiana's intestate succession which precluded an illegitimate child from claiming the same

14. Many legal scholars trace the origin of the marital privilege to the "natural repugnance theory" with regard to delving into the intimate aspects of one's marital existence.

15. See "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker Services", Fam. Law Quart. at 102, in which it was stated:

> 1. *Estimates based on 1970 and 1960 census figures suggest that the number of unmarried couples living together increased eight-fold during the 1960's.* Note, *"In re Cary:* A Judicial Recognition of Illicit Cohabitation", 25 Hastings L.J. 1226 (1974) ...2 U.S. Bureau of the Census 1970 Census of population, Persons by Family Characteristics, table 11, at 4B; 2 U.S. Bureau of the Census 1960 Census of Population, Persons by Family Characteristics, table 15 at 4B. (E.A.) (Appearing at footnote 1).

In *Marvin v. Marvin*, No. L.A. 30 520, 50 Cal. App. 3d 84 (1975), _____ P.2d _____ (Calif. 1977), the California Supreme Court recognized this phenomenon, in upholding the right to sue on a common-law marriage contract, overruling a long line of precedent.

rights as a legitimate child, based upon the unique historical state interest in determining property rights, but specifically distinguished between property rights and the issue of benefits provided by the State.

The marital relationship, is a relationship at the core of the right to privacy, in that said relationship necessarily involves intimate private communications, and procreation, such that this Court should be particularly sensitive to an arbitrary discrimination against common-law marriage.[16]

Since Mr. Lustig met the criteria of *Katz v. U.S.*, 389 U.S. 347 (1967), in that he had, in fact, an expectation of privacy in the communications and relationship with his common-law wife due to the confidential nature of the relationship, and society recognizes these expectations as reasonable, the marital privilege should attach.

Moreover, even absent equal protection, or the right to privacy, the importance of common-law marriage in current society means that the Court should recognize the common-law marital privilege under Rule 501 since the privilege meets all of the criteria enunciated for whether a common-law privilege is desirable.[17]

16. For the proposition that the Court has been particularly sensitive to such relationships, see *"Roe and Wade*: Does Privacy have a Principle" 26 Stan. L. R., 1161 (1973-74). The right to privacy emulates from the "penumbras" of the various other amendments (i.e. 1st, 9th, and 4th Amendments).

17. 8 Wigmore, Evidence §2285 delineates the criteria as:

> (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefits thereby gained for the correct disposal of litigation.

Thus, it is imperative that the Court grant certiorari in order to delineate the scope of the protection afforded a common-law marriage relationship in today's society, where such a substantial portion of said society is embraced in such relationships.

B. The Jury Instruction "...Very Little Evidence is Necessary to Show that a Particular Defendant was Part...(of a Conspiracy) ...Slight Evidence is Enough".

1. There is a Direct Conflict Between the Ninth Circuit and the Fifth Circuit with Regard to Whether this Instruction Constitutes Reversible Error.

Over objection the trial court instructed:[18]

> Once a conspiracy is shown to exist, *very little evidence is necessary to show that a particular defendant was a part of it. Slight evidence is enough.* Each member of the conspiracy is responsible not only for his own acts, but also for the acts and statements of the other members done and made in furtherance of the scheme. They are agents for each other. What one does pursuant to the common purpose all do. (Cert. Record 537). (E.A.)

The Ninth Circuit held:

> It is well established that once the existence of a conspiracy is established, only *slight* evidence is required to connect any defendant with it. *United States v. Freie*, 545 F.2d 1217, 1221 (9th Cir. 1976); *United States v. Westover*, 511 F.2d 1154, 1157 (9th Cir. 1975). (Emphasis in original). *U.S. Lustig*, supra, at 1275-1276.

Freie, supra, and *Westover*, supra actually deal with the standard for a directed verdict, relying on *U.S. v. See*, 505 F.2d 845 (9th Cir. 1974) (standard for directed verdict).

This holding directly contradicted the Fifth Circuit rule that the instruction is reversible error. *United States v. Murray*, 527

18. The Co-defendant below, Gregory D. Pederson, filed a Petition for a Writ of Certiorari on July 18, 1977 entitled *Gregory D. Pederson, Petitioner, v. United States of America*, Respondent, Case No. 77-5118, with regard to this identical issue. (Filed in *Forma Pauperis*).

F.2d 401, 409 (5th Cir. 1976); *U.S. v. Hall*, 525 F.2d 1254, 1255 (5th Cir. 1976); *U.S. v. Marionneaux*, 514 F.2d 1244, 1249 (5th Cir. 1975); *U.S. v. Brasseaux*, 509 F.2d 157, 161 (5th Cir. 1975).[19]

> ...the standard for *appellate* review...is whether slight evidence connected a particular defendant with the alleged conspiracy...It is, of course, error for the trial court to charge the jury in terms of 'slight evidence', *Murray*, supra, at 404. (citations omitted) (emphasis in original)

It is imperative this Court give direction with regard to this important issue, due to the large instance of conspiracy trials now coming before the lower courts. A substantial portion of the defendants therein are being tried on circumstantial evidence.

It is manifest the Fifth and Ninth Circuits are in absolute contradiction on this instruction, which dilutes the most basic principal of criminal law, the right to be convicted only on proof beyond a reasonable doubt as to each element of the alleged offense.[20]

2. The Instruction Conflicts with Decisions of this Court with Regard to Requiring Proof Beyond a Reasonable Doubt as to Each Element of the Offense Under the Due Process Clause.

The instruction clearly dilutes the standard of proof beyond a reasonable doubt. The Court held *In the Matter of Samuel*

19. Both the District Court, and the Court of Appeals, were on notice, that the cases cited dealt with the issue of the standard for a directed verdict and the Fifth Circuit rule was that the instruction was reversible error. (TR. 2108).

20. The error permeated all of the verdicts, since it allowed the use of statements and acts by co-conspirators with regard to the other counts of the indictment; there was no limiting instruction that the jury must find conspiracy before considering such evidence (TR 298), and the court refused to allow individual verdict forms with signatures for each juror, as to each defendant, for each count. (TR 2115, 2116).

Winship, 397 U.S. 358, 364, 25 L.ed.2d 368, 90 Sup. Ct. 1068 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, *we explicitly hold that the Due Process Clauses protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.* (E.A.)

Whether a particular defendant is part of a conspiracy is *a fortiori* an essential element of the crime of conspiracy.

> *...the erroneous instruction reduced the level of proof necessary for the government to carry its burden* by possibly confusing the jury about the proper standard or even *convincing jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt*. Hall, supra, at 1256 (E.A.).

C. The Denial of Effective Assistance of Counsel of One's Choice.

Due to a mistaken rigid construction of the speedy trial act, 18 U.S.C. 3164, repeated motions for continuance or severance, were denied, despite only four days for counsel of choice to prepare for trial.[21] The opinion holds: (1) It was Mr. Lustig's fault he did not obtain other counsel despite incarceration in substandard conditions, "frozen assets", "no attorney in town would touch the case", and only thirty days elasped from arraignment to trial. (2) Even with only four days to prepare,

21. The opinion disregards: (1) the original attorney never entered a general appearance (TR Vol XI, pg. 2), (2) the defendant expected to hire his partner, (3) conflicts as to the defense lead him to move to withdraw at the arraignment on the superseding indictment. Jail conditions severely interferred with attempts to seek counsel. The record reflects all efforts possible to obtain counsel. The court was told that no one would touch the case with the financial constraints imposed.

there was insufficient prejudice to mandate reversal. *U.S. v. Lustig*, supra, at 1267-1269.[22]

1. The Opinion Conflicts with Other Ninth Circuit and D.C. Circuit Decisions and Decisions of this Court with Regard to the Test for Prejudice from Arbitrary Interference with the Right to Counsel of One's Choice.

The cases cited in the decision were miscited or improperly distinguished. *Glenn v. U.S.*, 303 F.2d 536, 543 (5th Cir. 1962) contained no indication of interference with the ability to hire counsel, with a specific finding below of sufficient means.[23]

While a judge does have discretion to grant or deny continuances, in *U.S. v. Harris*, 501 F.2d 1 (9th Cir. 1974), and *Dant v. U.S.*, 405 F.2d 312, 315 (9th Cir. 1968), there was "no

22. The opinion finds no prejudice but holds the failure of counsel (retained four days prior to trial) to file instructions five days before trial waived any objections to the conspiracy instructions. Said lack of preparation was a direct contributing factor to failure to: (1) subpoena Phillis Resnek (TR. 2027) (2) obtain a suppression hearing (3) prepare for effective cross-examination of Callie Newton Lustig as to motive for bias or prepare effective surrebuttal of the extremely damaging testimony of Callie Newton Lustig. (TR 1924 for confusion of counsel with the name of common-law wife). See *Lofton v. Procunier*, 487 F.2d 434, 435 (9th Cir. 1973). Resnek was critical for confrontation as to both the twenty-seven phone calls to the police indicating that Mr. Lustig was a dealer and the nature of Callie's motive for bias.

23. The opinion avoids this issue by stating the court would have approved a fee agreement and "one could only infer that some attractive consideration prompted (present counsel to enter the case)". This ignores: (1) the right to retain counsel of one's choice. (2) there was not an attorney in town that "would touch this man. The only thing he has is his property, he doesn't have his cash." (TR 3/16/76, A115-73 Cr. at 40). (Note that Judge Plummer, to date, still has not released the assets). The "inferences" to the effect that present counsel "immediately rented an office, hired a secretary, investigator, research assistant, and another attorney to work on the case" (Note 5) are not supported by the record and are either exaggeration or misstatements. *Mardian v. U.S.*, 546 F.2d 973 (D.C. Cir. 1977) is improperly distinguished. As in *Mardian*, there was disparity in the evidence between Mr. Lustig and his co-defendants, (direct sales vs. circumstantial evidence), and it is reverse logic to argue that since the trial had not begun before the motions for continuance in the instant case, *Mardian* is inapplicable.

rational explanation" for the continuance, with counsel announcing ready at trial. *U.S. ex. rel. Baskerville v. Deegan*, 428 F.2d 714, 716 (2nd Cir. 1970), contained no dissatisfaction with counsel until trial. *U.S. v. Simmons*, 357 F.2d 763, 764 (9th Cir. 1972) presented a continuance request at trial, with "suspicious" reasons given for requesting new counsel. *Torres v. U.S.*, 270 F.2d 252, 255 (9th Cir. 1959) relied on previous continuances granted to obtain counsel. Here, the record reflects continuing concern by Mr. Lustig and his initial attorney for his right to counsel, and good cause for the continuance, due to the necessity for locating witnesses, with the only reason for the denial the mistaken belief that the Speedy Trial Act prohibited a continuance.

The wrong test for prejudice is applied. In *Lofton v. Procunier*, 487 F.2d 434, 435 (9th Cir. 1973), a defendant was forced to trial after counsel failed to show, despite a prior four week continuance. The Ninth Circuit reversed and remanded for an evidentiary hearing, indicating *de novo* findings of lack of prejudice could not be made for a denial of the right to counsel.

> *The required adequacy of counsel...can...*be *determined only when conducting an evidentiary hearing directed to the specific issue.*
>
> ...The most that can be seen from the record is...(the *attorney)...possibly did as well as any attorney could have done when the grave responsibility was suddenly thrust upon him without adequate opportunity for preparation*....an evidentiary hearing must be conducted to determine whether *Lofton* was effectively deprived of his Sixth Amendment rights....we reiterate that to this time, *there has been no hearing in any court in which the accuracy of the representations made by Lofton and his unprepared attorney can be tested. Lofton*, supra, at 436 (9th Cir. 1973) (E.A.)

In *Glasser v. U.S.*, 315 U.S. 60, (1942) the Court held:

> The right to have the assistance of counsel [of one's choice] is *too fundamental...to allow courts to indulge in nice calculations as to the amount of prejudice* arising from its denial. *Glasser*, supra, at 62 S. Ct. 467 (E.A.)

In *Chapman v. State of California*, 315 U.S. 75, Mr. Justice Stuart, concurring stated at page 837:

> *...when a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless.* (E.A.) (citing *Glasser*, supra)

In *Geders v. U.S.*, 425 U.S. 80 (1976), this court recognized a fundamental right to consult with counsel on the night prior to testifying, with harmless error not applicable.[24]

The Court should grant certiorari to delineate the precise test for prejudice from an arbitrary denial of a continuance to enable counsel of choice to prepare a defense, for cross-examination, and to call witnesses.

2. The Important Federal Question of the Impact of the Speedy Trial Act on the Right to Counsel has not Been, but Should be, Settled by this Court.

The Court has never ruled, whether a strict construction of the Speedy Trial Act, 18 U.S.C. §3164, may be used to subvert the right to counsel of choice. In *Powell v. Alabama*, 287 U.S. 45, (1932), this court said:

> It is hardly necessary to say that, the right to counsel being conceded, *a defendant should be afforded a fair opportunity to secure counsel of his own choice.* 287 U.S. 53. Cited at *Glasser v. U.S.*, 315 U.S. 60, 70 (1942). (E.A.)

24. Mr. Lustig was forced to consult the night before testifying within sight and hearing of the co-defendants in a crowded jail hallway. (TR 1587) (see also *U.S. v. Decoster*, 487 F.2d 1197 (D.C. Cir. 1973) (standards of effective assistance). The jail was severely overcrowded and the subject of a class action suit for reasonable access to counsel. (TR. 1670, 1587, 1590) TR A115-73 Cr., 4/27/76 at 3, 5, 6, 8, 17, 18, and 19 (class action suit filed as exhibit).

The Court spoke again *In re Groban*, 352 U.S. 330, 332 (1957):

> A defendant in a state criminal trial has *an unqualified right, under the due process clause, to be heard through his own counsel.* (E.A.)

The seventh Circuit, in *United States v. Seale*, 461 F.2d 345 (1972), condemned the failure to make sufficient inquiries into objections to proceeding to trial without counsel of choice or to allow for justifiable delay.[25]

> If the Sixth Amendment rights to the effective assistance of counsel means anything, it certainly means that it *is the actual choice of the defendant which deserves consideration.* 461 F.2d at 358. (E.A.)

In *Mardian*, supra, at 546 F.2d 977, Bazelon wrote:[26]

> ...in the trial of conspiracy cases involving a number of defendants...the liberal rules of evidence and the wide latitude accorded the prosecutor may, and sometimes do, operate unfairly against an individual defendant...*Glasser v. U.S.*, 315 U.S. 60, 76 (1942). *The dangers of transference of guilt are such that the court should use "every safeguard to individualize each defendant in his relation to the Mass." Kotteakos v. U.S.*, 328 U.S. 750, 774, 773 (1946). See *Blumenthal v. U.S.*, 332 U.S. 539, 559 to 560 (1948). (E.A.)

The Court should grant certiorari to hold the Speedy Trial

25. See also *U.S. v. Mitchell*, 354 F.2d 767 (2nd Cir. 1966) Selection of counsel has special meaning in unpopular causes.

26. Here, as in *Mardian*, supra, the continuance to enable counsel of choice to prepare was not due to any fault of counsel as attributable to the defendant. See also, *Releford v. U.S.*, 288 F.2d 298. (9th Cir. 1961) (reasonable continuance to guarantee counsel of choice).

Act, 18 U.S.C. 3164 cannot be perverted to deny one the right to effective assistance of counsel of choice.[27]

D. The Warrantless Seizure of the Opaque Parcel from Mr. Lustig's Truck and the Warrantless Search of the Parcel at Police Headquarters.

1. The Opinion Decides the Important State Question of the Permissible Scope of an Inventory Search and Seizure in Conflict with Applicable Alaska Law and *South Dakota V. Opperman*, 428 U.S. 364 (1976).

The opinion incorrectly states the sealing machine was found during a proper inventory search, pursuant to impounding, holding the seizure valid under 13 A.A.C. §2.375, and *South Dakota v. Opperman, supra*. In Alaska, under *Daygee v. State*, 514 P.2d 1159 (Alaska, 1973), and 13 A.A.C. 02.350, an inventory search is invalid where an arrestee has means of removing the vehicle, desires to do so, and there is no contraband in plain view.[28]

2. The Opinion Decides the Important Federal Question of a Permissible Warrantless Seizure and Search Pur-

27. See the remarks of Chief Justice Warren Burger, at the 53rd annual meeting of the American Law Institute, paraphrased at 19 Cr.L. Rptr. 2210 (1976) to the effect the act is too inflexible, particularly in complex cases requiring extensive trial investigation and preparation.

28. Mr. Lustig made repeated demands to allow his friends to remove his vehicle, who were standing by with a boom truck. (Tr. 1345-1348). These demands were made prior to the search of the opaque brown paper bag containing the sealing machine. Under *South Dakota v. Opperman, supra*, an inventory search by State officers is dependent upon State law and necessity. Alaska Troopers served a Federal warrant to arrest Mr. Lustig, and searched the bag at Troopers headquarters, thus Alaska law is relevant. See also *Altman v. State*, 19 Cr. Rptr. 882 (9/1/76) (Ct. of App., Florida, 7/30/76), (impound must be necessary for inventory search), and *United States v. Lusk*, A-75-104 Cr. (U.S.D.C. Alaska 1/7/76) (inventory invalid if arrestee has means of removing the vehicle under 13 A.A.C. 02.350) (Appellant's brief below at 79). See e.g. *United States v. Colandra*, 414 U.S. 338 (1974).

suant to an Arrest in Direct Conflict with *U.S. V. Chadwick*, 97 S.Ct. 2476, 45 L.W. 4798 (1977)

The actual discovery of the sealing machine occurred at the police station,[29] where a further search of the bag was done by the arresting officers.[30] (Tr. 765, 768).

In *Chadwick*, supra, the Court held:

> "*Once law enforcement officers have reduced property not immediately associated with the person of the arrestee to their exclusive control*, and there is no longer any danger that the arrestee may gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. 97 S.Ct. at 2485, 45 L.W. at 4801.
>
> . . .
>
> In our view, *when no exigency is shown to support the need for an immediate search, the warrant clause places the line [where a warrant is needed] at the point where the property to be searched comes under exclusive dominion of police authority*. 97 S.Ct. at 2486, 45 L.W. at 4801. (E.A.)

Since *Chadwick, supra*, was rendered by this court after the

29. The arresting officer opened the bag, and seized it after seeing the scale, but did not find the sealing machine until a further search was conducted at Trooper headquarters, after Mr. Lustig's friends had arrived with a boom truck to remove the vehicle, and the officers had refused to allow this procedure contrary to 13 A.A.C. 2.350. Since the bag was in the complete control of the police, and was searched "remote in time (and) in place from the arrest" *Preston v. United States*, 376 U.S. at 367 (cited in *Chadwick, supra*, at 97 S.Ct. 2485, 45 L.W. 4801), the search was invalid.

30. In *Chadwick*, supra, as in the instant case, the search occurred approximately an hour and a half later at the police station, and the property searched was in the control of the police. While in *Chadwick*, the police clearly had probable cause to seize the container, here, since the arrest was not contemporaneous with the alleged offense, there was no probable cause to believe that the scales were contraband, or the fruits of a crime, so as to justify a warrantless seizure, even during the initial search of the car. See *Lemon v. State*, 514 P.2d 1156 (Alaska, 1973), (contemporaneous nature of offense and arrest gives probable cause for search pursuant to arrest for evidence. See also *McCoy v. State*, 491 P.2d 120 (Alaska, 1971).

instant decision, the Court should grant certiorari to summarily reverse.[31]

E. The Denial of Confrontation for Bias and the Denial of a Two Hour Continuance to Produce a Critical Witness.

The opinion excuses the denial of confrontation on motive for bias as to Tarnef and Callie Newton, finding said matters collateral.[32]

Cross-examination of the most damaging witness, Callie Newton, was restricted as to whether she was biased due to financial interest (her civil suit; TR 1988) or due to the influence by Phyllis Resnek, her lesbian lover. (TR 2013, 2015).

Counsel was prohibited from confronting the source of hearsay statements to the police (i.e. 27 phone calls stating Mr. Lustig was a drug dealer), or producing evidence of Callie's bias, (TR 2046, 2058, 2084, 2064) by the denial of a two hour continuance (TR 2025, 2675, 2081, 2082) to serve a subpoena

31. For other Alaska cases restricting the permissible scope of a search incidence to arrest, holding that a warrant is needed for further intrusions occasioned by any such search, see *Anderson v. State*, 555 P.2d 251 (AK 1976), *State v. Spietz*, 531 P.2d 521 (AK 1975), and *Schraff v. State*, 544 P.2d 834 (AK 1975). For the Alaska counterpart of *Chadwick, supra*, see *Erickson v. State*, 507 P.2d 508 (AK 1973) (warrant needed where closed container in control of the police, despite probable cause). See also *United States v. Martin*, 21 Cr. Rptr. 2045, (4/4/77) (D.C. Cir. 1977), (warrant needed for suitcase despite probable cause). See also *Faubion v. United States*, 424 F.2d 437, 440 (10th Cir. 1970) and *People v. Marshall*, 69 Cal. Rptr. 558, 442 P.2d 668), (warrantless search of closed containers in police custody unconstitutional).

32. The defense attempted to cross-examine Tarnef as to potential charges for narcotics, felony murder, perjury, and arson. Several offers of proof were made as to relevance. (TR 1514, 1791, 1792, 1805, 1516, 1517, 1518) For Tarnef's history of lying for hire see "*Tarnef v. State, Miranda* is Alive and Well in Alaska", UCLA-AKA L.R., Vol. 4, No. 1. See also, *Tarnef v. State*, 512 P.2d 923 (AK 1973) and *Tarnef v. State*, 492 P.2d 109 (AK 1971).

on Phyllis Resnek who was avoiding process (TR 2051).[33] *C. F. Dutton v. Evans*, 400 U.S. 74 (1970), *Bruton v. U.S.*, 391 U.S. 123 (1968), *Lemmon v. State*, 514 P.2d 1151 (AK 1973). In *Davis v. State of Alaska*, 415 U.S. 308, (1974) the Court held motive for bias is never collateral; it is proper to cross-examine as to motive for testifying, due to potential or actual pending charges. See also *Evans v. State*, 550 P.2d 830 (AK 1976)[34] In *Hutchings v. State*, 518 P.2d 767 (AK 1974), the court held:

> *There are no special rules of 'proper impeachment' for bias. The credibility of witnesses is always a material issue....* when evidence is offered to impeach for *bias...[where]...the evidence tends to reasonably demonstrate* the existence of some facts, state of mind, or condition that a reasonable person would take into account in assessing the credibility of the witness under attack, *...the balance must be weighed in favor of admissibility* ...Id. at 769. (E.A.)

The Court should grant certiorari to establish clearly that "harmless error" cannot be applied to denial of confrontation for bias or motive, in the face of a clear offer of proof as to relevance.

33. The Ninth Circuit opinion holds at footnote 7 the continuance was properly denied since not requested until the defense had rested. The defense rested early, to accommodate the prosecution and the court, who expressed concern for Mr. Tarnef's safety over the coming weekend. (TR. 1939, 2021, 1583-1586). Efforts to investigate and locate Ms. Resnek were made from the time counsel of choice entered the case. (TR 2025-2027). Callie's testimony contained references to hearsay statements by Resnek. The exclusionary rule for witnesses was violated by a 'relay' by Lee Peterson, former Ass. U.S. Atty. to Resnek, to Callie, inducing her to testify by a false characterization of Mr. Lustig's testimony. (TR. 2014) An offer of proof as to the relevance of Phyllis Resnek for bias and the source of hearsay was made at TR 2082-2089.

34. For cases holding mere possibility of prosecution sufficient for bias see *R. L. R. v. State*, 487 P.2d 27 (AK 1971), and *Whitton v. State*, 479 P.2d 302 (AK 1970). (Undue confrontation restriction reversible per se) See also, *Alford v. U.S.*, 282 U.S. 687 (1931), *Hughes v. U.S.*, 427 F.2d 66 (9th Cir. 1970) (undue restriction on confrontation as to fear of possible prosecution).

F. The Refusal to Allow an Individual Poll as to Each Count Where the Petitioner had Admitted One Count in his Testimony.

Despite the petitioner admitting one count (Count V, possession) in his defense, the Court denied a specific request for an individual poll as to each count.[35]

> The Court: Do you wish the jury polled?
> Mr. Weidner: *Your Honor, I would request an individual poll at this time.*
> The Court: *I would ask that the jury be polled in the usual way.*
> Mr. Weidner: *I would ask that the jury be polled as to each count.*
> The Court: Ladies and gentlemen, the clerk will call the roll. If the verdict that was read was a true verdict you will answer "yes". If it is not, answer otherwise. (TR 2249). (E.A.)

This constitutes blatant refusal of the constitutional and statutory right to "look the jury in the eye" as to each count.[36] The Ninth Circuit opinion, cites *Shibley v. U.S.*, 237 F.2d 327, 334 (9th Cir. 1956), cert. denied, 352 U.S. 873 (1956), as authority for its holding without indicating that in *Shibley*, supra, the issue was raised as a result of a clerical error, was mooted on appeal, and there was no objection below.

While generally, the cases reversing for deficiency in the poll

35. The Court "reminded" defense counsel it was unnecessary to take "exception" to error to preserve it. The jurors had been asked juror by juror as to the combined counts for each co-defendant; thus an "individual poll" had to mean an individual poll as to each count.

36. While the other circuits, or the Court, have never been squarely faced with this issue, all hold that there is a common-law and statutory right to a poll of the jury. *Humphries v. District of Columbia*, 174 U.S. 190 (1899), and a denial of said poll constitutes reversible error. See generally *United States v. Edwards*, 469 F.2d 1362 (5th Cir. 1972); *U.S. v. Sexton*, 456 F.2d 961 (5th Cir. 1972)

have been those where some confusion was manifested,[37] since the purpose is to "ascertain for a certainty that each of the juror approves of the verdict as returned; that no one has been coherced or induced to sign a verdict to which he does not fully assert". *Humpries*, supra, the Court should grant certiorari to adopt a per se rule for reversal where there has been an intentional denial of the right to a poll as to each count of a multiple count indictment.[38]

G. The Arbitrary Refusal of the Right to be Present, or a Record, at the Communication with and Excusal of a Juror.

The opinion excuses the intentional denial of the right to be present, or to a record, by holding that hearings are unnecessary on question of fitness, in-camera inquiries are permissible, and no prejudice was shown.[39]

37. See *Williams v. U.S.*, 419 F.2d 740 (1970), *U.S. v. Edwards*, supra; *U.S. v. Sexton*, 456 F.2d 961, (5th Cir. 1972) Mr. Lustig was prevented from demonstrating the fact that one juror wished to reputiate some of the counts during the poll, by the denial of the individual poll. See paragraphs 5, 6, 7 and 8 of the affidavit of defense counsel of May 19, 1976 (R. 626) where an offer of proof was made to this effect.

38. The defendant specifically requested separate verdicts as to each count with spaces for signatures of the individual jurors. (TR. 2116) See *Posey v. U.S.*, 416 F.2d 545, 553 (5th Cir. 1969. For the roll of the poll in resolving confusion see *U.S. v. Farries*, 328 F.Supp. 1074 (6th Cir. 1971) (Poll as to each count of a seven count indictment), *U.S. v. Visuana*, 395 F.Supp. 352 (1975) (individual poll; not guilty in Count I; guilty in Count II), *U.S. v. Lockhart*, 366 F.Supp. 843 (D.C. Penn 1973) affirmed 495 F.2d 1369 (uncertainty during poll resolved by further poll). See also *Lee v. State*, 509 P.2d 1088 (Alaska 1973) (right to be present at return of verdict encompasses common-law right to look the jury in the eye). See also, Rule 31(d) of the F. R. Crim. P. for right to poll jury as to verdict and 18 U.S.C. §§3771 and 3772.

39. The opinion claims the dismissed juror divulged information making him believe the appellant was guilty. This was never established; the trial judge simply made unsworn conclusionary implications he thought the juror would be unfair. Mr. Lustig requested a hearing to argue to the judge as to the juror's fitness, and preserve the record for appeal.

The cases cited are improperly cited, or are clearly distinguishable. *U.S. v. Domenach*, 475 F.2d 1229, 1232 (2nd Cir. 1973) dealt with dismissal for cause (absence) manifest to counsel for defendant. *U.S. v. Cameron*, 464 F.2d 333, 335 (7th Cir.) presented disability manifest in open court (falling asleep). *U.S.v. Crisona*, 416 F.2d 107, 119 (2nd Cir. 1969), miscited by the instant decision to avoid the right to be present issue, relied on absence of objection or demand for hearing. *U.S. v. Houlihan*, 332 F.2d 813 (2nd Cir. 1964) relied on exigent circumstances foreclosing an evidentiary hearing.[40] See also, *U.S. v. Woodner*, 217 F.2d 649, 652 (2nd Cir. 1963) (necessity for hearing and record). To date court orders prohibit defense inquiry of the juror as to what occurred in chambers or what he indicated to the other jurors. *U.S. v. Goodman*, 457 F.2d 68, 73, is miscited since it relied on an evidentiary hearing to cure any possible prejudice. It is likewise, error for the decision to hold that Mr. Lustig approved of the alternate, to attempt to avoid the issue as harmless error.[41]

1. The Opinion is in Conflict with the Other Courts of Appeals, and this Court with Regard to the Right to be Present at Critical Stages of the Proceedings Including Communications with the Jury.

Rule 43, of the F. R. Crim. P. provides:[42]

> The defendant *shall be present* at the arraignment, *at every stage of the trial including the empanneling of the jury and the return of the verdict* ...(E.A.)

40. Here, no extrigent circumstances existed; both Mr. Lustig and counsel were demanding a hearing.

41. The petitioner reserved one preemptory challenge as to the trial jurors. The petitioner did exhaust peremptory challenges with regard to the alternates, and the reservation of the one perempt for the trial jurors was to avoid seating the juror Scott. (i.e. the alternate eventually seated over objection). (TR. at 130). See Petitioner Lustig's Reply Brief in 76-2661 at page 4-6, for a full explanation of the jury selection procedure in the U.S. District Court for Alaska.

This right existed at common-law in the form of a defendant's privilege of presence, and is grounded in the Sixth Amendment to the U.S. Constitution,[43] and Article 1, §11 of the Alaska Constitution.[44]

While the Court has stated that the right "deals with the rule of common-law and not with constitutional constraints", *Snyder v. Commonwealth of Mass.*, 78 L.ed 674 (1927), the lower Federal courts have often found it based on the constitution.[45]

In delineating the important purpose of the rule the Court has stated:

> *A leading principal that pervades the entire law of criminal procedure is that after the indictment is found, nothing shall be done in the absence of the prisoner. Lewis v. U.S.*, 146 U.S. 370, 372 (1882), (E.A.).

In, *U.S. v. Arrigada*, 451 F.2d 487 (4th Cir. 1971), cert. denied 405 U.S. 1018 (1972) the court recognized Rule 43 applies to:

> "*proscribe any communication by [the] court with the jury, whether before or after it has begun its deliberations*, without the presence of the defendant (and) is a salutary provision which should be scrupulously observed by trial judges. (E.A.)

42. See also AK R. Crim. P. 38, encompassing the same language.

43. See 82 Moore's Fed. Pract. §43.02, pg. 43-3; and see *Brown v. State*, 372 P.2d 785, 788, at footnote 8 (AK 1962) (Sixth Amendment Origins).

44. *Brown v. State*, supra, at footnote 9.

45. See Wright, Federal Practice and Procedure, Crim., Section 721, p. 193 and citations at footnote 3 therein.

In *U.S. v. Chrisco*, 493 F.2d 232, (C.A. Mo. 1974) cert. denied 419 U.S. 847 it was noted that the:[46]

> ...process for impaneling a jury, during which *this rule ensures defendant's presence* encompasses *all steps of selecting a jury, including peremptory striking of members of the venire.* (E.A.).

U.S. v. Miller, 463 F.2d 600, (1st Cir. 1972) cert. denied 409 U.S. 956 (1973), noted that the challenging of prospective jurors is an essential part of the trial.

The decision ignores the point that Mr. Lustig was denied not only his right to be present during the judge's questioning in-chambers of the juror, but his right to an evidentiary hearing under oath as to the alleged prejudice, or the contact with the juror.[47]

In *Abbot v. Mines*, 411 F.2d 357 (5th Cir. 1969),[48] the court recognized the folly of requiring a showing of prejudice from an intentional interference with rules drafted to guarantee the preservation of a record as to said prejudice. *Metropolitan Paving Company v. Int Union of Op. Eng.*, 439 F.2d 300, 304

46. The cites to *Arrigada*, supra, and *Chrisco*, supra, are paraphrases of the language of said cases appearing at footnotes 17 and 21 to Rule 43 of the U.S.C.A.

47. See F. R. Crim. P. 26 (testimony taken in open court), F. R. Evid. 603 (oath or affirmation), F. R. Evid. 605 (judge not a competent witness).

48. See also, *Wade v. U.S.*, 441 F.2d 1046 (D.C. Cir. 1971) (standard for reversal from the denial of presence is any possibility of prejudice), *McKissick v. U.S.*, 379 F.2d 762 (5th Cir. 1967) (record must demonstrate lack of prejudice beyond a reasonable doubt.), *U.S. v. Crutcher*, 405 F.2d 339, 244 (2nd Cir. 1968) (denial of right to be present during voir dire jury selection cannot be harmless error), *Ware v. U.S.*, 376 F.2d 717, 721 (7th Cir. 1967), *Jones v. U.S.*, 299 F.2d 661 (10th Cir. 1962), *Parker v. U.S.*, 184 F.2d 488, 490 (4th Cir. 1950), *Arlington v. Robertson*, 114 F.2d 821 (3rd Cir. 1940) (civil), *Fina v. U.S.*, 46 F 2d 643, 644 (10th Cir. 1931) (right to be present linked to Fifth and Sixth Amendments.)

recognized that *Abbot* held the controlling issue is not whether a party can actually show prejudice by the failure to follow said rules, but whether the adopted precedure tends to weaken the institution of a jury trial.

The arbitrary denial of both presence, or a record under oath, coupled with a specific order prohibiting any contact with any juror, precludes an effective showing of prejudice, such that this Court should grant certiorari to lay down a rule of per se reversal for such conduct.

2. Certiorari Should be Granted Since the Opinion Sanctions the Departure by the Trial Court from the Accepted and Usual Course of Judicial Proceedings so as to Call for an Exercise of this Court's Power of Supervision.

In addition to intentionally denying the right to be present at either of the communications with the juror, the trial court prohibited an evidentiary hearing or record as to the contacts.[49]

This misconduct denied the defense the right to examine the excused juror as to communications of bias to other jurors, the right to argue to the judge as to whether the juror should have been excused, the right to a record of the reasons for the excuse, and the right to an oath given by competent witnesses. In addition, it violated several judicial cannons, and established rules of criminal procedure.[50]

49. After the first in-chambers contact, the judge specifically denied the request on the record to be present, and conducted further proceedings in-chambers without a record being made, (TR 330) and then specifically forbade any defense contact with the excused juror (TR 330) (R. 637), or an evidentiary hearing. The actual excuse of the juror occurred in-chambers, absent the defendant or counsel. (TR. 328). By written motion for mistrial, the judge was again on notice the following day as to the error. (R. 317-320).

50. See F. R. Crim. P. 26 (testimony in open court), F. R. Evid. 603 (oath or affirmation) F. R. Evid. 605 (judge not competent witness), F. R. Crim. P. 43 (right to be present), Cannon Jud. Ethics No. 22 (right to record). (Appendix c, infra.)

This Court should grant certiorari to establish clearly that in the absence of exigent circumstances, ex-parte contact with a juror, and unilateral decisions by the judge, cannot be condoned.

VII. SUMMARY AND CONCLUSION

The equal protection, due process, and privacy aspects of the common-law marital relationship, are of such substantial current importance that this Court should rule that the protection of Rule 501 attaches.

The Ninth Circuit decision presents a substantial threat to the concept of proof beyond a reasonable doubt and directly conflicts with the Fifth Circuit.

The Petitioner was denied his right to effective assistance of counsel, and his right to cross-examine and confront his accusers, and to call witnesses.

United States v. Chadwick, supra, rendered after the instant decision, holds a search of the type upheld by the Ninth Circuit is unconstitutional.

The intentional denial of the right to poll the jury, to be present, or to have a record, and the communication with, and excuse of, a juror, denied the constitutional right to a jury trial and due process.

Accordingly, this Court should grant the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings, and should reverse both the Ninth Circuit and the District Court.

DATED at Anchorage, Alaska, this 12th day of September, 1977.

PHILLIP P. WEIDNER
Attorney for Petitioner,
GEORGE H. LUSTIG
Drathman, Weidner & Bryson
333 West Fourth Avenue, Suite 35
Anchorage, Alaska 99501

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that pursuant to Rule 21(1), Rule 33(1), Rule 33(2)(1), and Rule 33(3)(b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. G. Kent Edwards
U.S. Attorney
605 West Fourth Avenue
Anchorage, Alaska 99501

and further, that three copies of the foregoing Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit was served upon the Solicitor General of the United States by depositing the same in the United States mail, at Anchorage, Alaska, postage pre-paid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and further, that three copies of the foregoing Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for both co-defendants in the instant proceedings below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. F. P. Pettyjohn
631 "I" Street
Anchorage, Alaska 99501
Attorney for George D. Pederson

George L. Schraer
2715 Hillegass Avenue, #4
Berkeley, California 94705
Attorney for Cheryl Rae Pederson

DATED at Anchorage, Alaska, this 12th day of September, 1977.

Phillip P. Weidner

PHILLIP P. WEIDNER
Attorney for Petitioner
George H. Lustig

APPENDIX A — OPINION OF THE NINTH CIRCUIT

IN NO. 76-2-661, U.S. V. LUSTIG, et al.

UNITED STATES of America,
Plaintiff-Appellee,

JUL 5

v.

George H. LUSTIG,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gregory D. PEDERSON,
Defendant-Appellant.

Nos. 76–2661, 76–2752.

United States Court of Appeals,
Ninth Circuit.

June 15, 1977.

Defendants were convicted before the United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge, of distribution of a controlled substance and conspiracy to distribute a controlled substance, with one defendant also being convicted of possession of a controlled substance, and they appealed. The Court of Appeals, James M. Carter, Circuit Judge, held that: (1) denial of continuance, which was requested by newly obtained counsel some four days prior to trial, was not abuse of discretion; (2) in camera excu-

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sal of juror and his replacement with approved alternate was not prejudicial; (3) probable cause was not required for postarrest inventory search of defendant's truck; (4) neither the "anti-marital facts" privilege nor the "confidential marital communications" privilege barred admission of testimony of defendant's former common-law wife as to her observations of defendant's engaging in drug transactions with third parties and (5) district court did not erroneously curtail cross-examination of informant.

Judgments affirmed.

1. Criminal Law ⇐641.12(1)

Failure to grant continuance, which was sought some four days prior to trial, did not deprive defendant of effective assistance of counsel since although defendant did not obtain substitute counsel until day of motion, defendant had over a month after original counsel's motion to withdraw within which to obtain new counsel and it was unlikely that defendant would be unable to find willing counsel, there were no prejudicial factors and record revealed extensive and competent argument and cross-examination by counsel in the relatively uncomplicated case; although it was arguable

whether new counsel should have been granted more time, there was no abuse of discretion.

2. Criminal Law ⇐586

Court-imposed freeze on defendant's assets could not be found to have prevented him from hiring new counsel, for purpose of determining whether denial of continuance sought by new counsel some four days prior to trial was abuse of discretion, since freeze was for limited purpose of insuring that defendant would not flee and freeze would not have prevented payment of an attorney if request had been made; in any event, defendant was of substantial means and new counsel immediately rented an office and hired a secretary, investigator, research assistant and another attorney to work on the case.

3. Criminal Law ⇐586

Trial court has wide discretion to grant or deny continuances.

4. Criminal Law ⇐593, 1168(8)

Actual prejudice must be shown before a trial court's denial of continuance will be reversed; moreover, a court must be wary against the "right of counsel" being used as a ploy to gain time or effect delay.

5. Criminal Law ⇐1138(2)

Court of Appeals may review the record to determine the adequacy of representation and possible prejudice from a denial of a continuance.

6. Criminal Law ⇐573

Speedy Trial Act allows 90 days from arrest within which to bring a defendant to trial; moreover, delays attributable to defendant are not counted. 18 U.S.C.A. § 3164.

7. Criminal Law ⇐649(2)

Denial of continuance to enable defendant to call witness to allegedly establish that defendant's common-law wife was motivated by revenge in testifying against him was not abuse of discretion since request came after defense rested its case and could not be said to be a product of anything except lack of due diligence; moreover, testimony would have been cumulative and marginally relevant.

8. Jury ⇐133

A judge may dismiss a juror for cause without a hearing; likewise, the court is not required to hold hearings on questions of fitness; in camera inquiries are sufficient.

9. Criminal Law ⇐1163(2)

Reviewing courts will not presume

prejudice where the trial judge removes a juror.

10. Criminal Law ⇐636(1)

Failure to hold hearing prior to dismissing juror who, under oath, revealed that he possessed information about the case which made him believe that defendants were guilty did not violate defendant's right to be present at all critical stages of a proceeding especially since excused juror was replaced with an alternate, who had previously been approved by defendants; to have retained the juror would have been prejudicial.

11. Criminal Law ⇐1166.16

Objection that excusal of a venireman who failed to take the oath prior to voir dire was prejudicial error, apparently because of some vague religious grounds, was frivolous; there was no indication that the venireman's failure to take the oath had anything to do with religious grounds and, in any event, the excusal did not violate defendant's rights.

12. Criminal Law ⇐874

Where on being polled as to whether a true verdict had been announced each juror answered in the affirmative, trial court did not abuse its discretion in refusing defendant's request to poll the

jury as to each of the four counts since such procedure would have been needlessly repetitious; however, defendant would have had a valid objection had one or more jurors expressed some uncertainty as to the verdict.

13. Criminal Law ⇐874

Jury polling is a matter for the discretion of the court.

14. Criminal Law ⇐875(1)

Trial court, in drug prosecution, was not required to use jury form in which there was a place for each juror to sign after each count of the indictment; in fact, forms do not even have to be used and, where they are, any reasonable form will suffice. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

15. Criminal Law ⇐956(1), 957(1)

Where no dissent or uncertainty is demonstrated in court, testimony will not be received from jurors or others regarding the verdict itself.

16. Criminal Law ⇐956(1)

Defendant could not be heard to attack verdict on ground that after verdict was received a juror had repudiated it, especially where party who allegedly overheard the repudiation was not re-

vealed and record did not reveal any uncertainty or disagreement with the verdict by any juror.

17. Drugs and Narcotics ⇐183

A "seal-a-meal" bagging machine and unused "seal-a-meal" bags and drug-weighing scales obtained on inventory search of contents of defendant's truck prior to its impounding following his arrest were properly seized and used as evidence in drug prosecution; probable cause for such search was not required. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

18. Searches and Seizures ⇐3.8(1)

Search warrant for defendant's house was not invalid on ground that it did not contain sufficient information to be a "night time warrant" where search occurred at 9 PM, an hour before the "night time" requirement begins; moreover, government did not introduce any fruits of such search during its case in chief.

19. Constitutional Law ⇐82

Use of defendant's telephone records as evidence in drug prosecution did not violate his right to privacy since the "expectation of privacy" only extends to the

content of telephone conversations and not to records that conversations took place. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

20. Witnesses ⇐54, 188(1)

Federal courts recognize two distinct privileges arising out of the marital relationship; the first, referred to as the "anti-marital facts" privilege, bars one spouse from testifying against the other and permits either spouse, on objection, to exclude adverse testimony by the other; the second privilege protects "confidential marital communications" and bars testimony concerning interspousal, confidential expressions arising from the marital relationship. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed. Rules Crim.Proc. rule 26, 18 U.S.C.A.

21. Witnesses ⇐64(1), 195

The "anti-marital facts" privilege is what remains of the old common-law rule that a spouse was incompetent as a witness for or against the other spouse based on the legal fiction that the husband and wife were one person; hence, such privilege does not survive the termination of the marriage; however, the "confidential marital communications" privilege survives termination of the

marriage. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim. Proc. rule 26, 18 U.S.C.A.

22. Witnesses ⇐63, 189

Neither "anti-marital facts" privilege nor "confidential marital communications" privilege prevents introduction of testimony of defendant's common-law wife as to defendant's drug dealings since both privileges depend on existence of a valid marriage, as determined by state law and, under Alaska law, common-law marriage is not valid. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 26, 18 U.S. C.A.; AS 25.05.011, 261, 311.

23. Witnesses ⇐63, 189

Even if equal protection requires that marital privileges be extended to ceremonial as well as common-law marriages, regardless of whether common-law marriages are recognized by state law, such proposition would not have aided defendant, complaining of admission of testimony of common-law wife, since as to the "anti-marital facts" privilege the record revealed that marital relationship had been terminated with no chance of reconciliation and the "confidential marital communications" privilege would have been equally unavailing since "wife's" testimony concerned matters neither communicative nor confidential, in that most of her testimony related to observations of defendant's engaging in drug transactions with third parties. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846; Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed. Rules Crim.Proc. rule 26, 18 U.S.C.A.; AS 25.05.011, 261, 311.

24. Witnesses ⇐191, 193

The "confidential marital communications" privilege applies only to utterances or expressions intended by one spouse to convey a message to another; even if one spouse's acts are held to constitute "communications" the privilege is not extended to communications made to or in presence of third parties since they are not intended to be confidential. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 26, 18 U.S.C.A.

25. Witnesses ⇐191

Acts do not become privileged communications, for purpose of the marital communications privileges, simply by being done in the presence of a spouse. Federal Rules of Evidence, rule 501, 28 U.S.C.A.; Fed.Rules Crim.Proc. rule 26, 18 U.S.C.A.

26. Criminal Law ⇐663(4)

Even if testimony of defendant's common-law wife violated sequestration order, receipt of such testimony was a matter falling within the trial court's discretion.

27. Witnesses ⇐331½

Extent of impeachment is committed to the trial court's discretion; such court must determine whether the probative value of the evidence is outweighed by the danger of confusion, prejudice, or waste of time; trial court's determination will not be reversed absent a showing of abuse. Federal Rules of Evidence, rules 403, 608(b), 28 U.S.C.A.

28. Witnesses ⇐372(2)

Alleged curtailment of defense counsel's cross-examination of informant regarding his possible involvement in several criminal activities was not abuse of discretion since counsel was able to make a broad inquiry into informant's credibility and possible bias and, among other things, inquired as to his agreement with the police and whether he had received any termination of probation or parole as a result of his testimony and as to whether he had lied in other proceedings. Federal Rules of Evidence, rules 403, 608(b), 28 U.S.C.A.

29. Witnesses ⇐270(1)

Where defense counsel often strayed from relevancy in his exhaustive cross-examination of police officers, it was not error for the trial court to lead him back to it. Federal Rules of Evidence, rules 403, 608(b), 28 U.S.C.A.

30. Criminal Law ⇐339.7(1)

The 30 seconds to one minute in which undercover detective viewed individual from whom his immediate seller obtained drugs was not inadequate for later identification from pretrial photographic display, which occurred two hours after cocaine sale, since the detective was a good witness in terms of his likely ability to observe and remember the scene and his identification was verified by that of three other persons who saw defendant for longer periods; furthermore, there also was substantial corroborative evidence supporting conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

31. Criminal Law ⇐412(5)

Evidence of defendant's statement, "You are not going to pin that on me," which statement was made after police discovered a bag of cocaine in the police car near defendant after his arrest, was

admissible for purpose of showing that defendant knew the bag contained cocaine where defendant was advised of his rights immediately on arrest and statement was made several minutes thereafter; likewise, various statements made by defendant at time of booking were also admissible. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

32. Witnesses ⇐301

Codefendant, who took stand to advance defense of entrapment, was not denied right against self-incrimination because he was compelled to tell from whom he had obtained the drugs, on theory that since he failed to identify defendant as his source and defendant was nevertheless convicted the codefendant had lost his credibility and was thereby incriminated, where prior to cross-examination counsel for defendant has asked codefendant about any meetings or dealings between the two; hence, line of inquiry had been opened and government was merely pursuing it and, furthermore, evidence of conspiratorial activity would refute entrapment defense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

33. Witnesses ⇐277(4)

A defendant has no right to give testimony without laying himself open to cross-examination on that testimony.

34. Drugs and Narcotics ⇐104

Failure to republish schedules listing cocaine as a controlled substance was not fatal to drug indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

35. Drugs and Narcotics ⇐108

Trial court, in drug prosecution, did not err in refusing to hear evidence about the pharmacological nature of cocaine; since defendant presented detailed motions to the court discussing the nature of cocaine it would have been a waste of time to hear extensive testimony on such marginal issue. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

36. Drugs and Narcotics ⇐46

Cocaine is not improperly classified as a controlled substance on ground that it is relatively harmless. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

37. Criminal Law ⇦700
Federal Courts ⇦404

Conviction was not required to be overturned on ground that prosecutors improperly "forum-shopped" for the best court in which to obtain drug conviction, notwithstanding cooperation between state and federal officers, since a federal warrant was obtained for defendant's arrest and he never was indicted by the state; furthermore, when in federal courts, federal law and procedures apply and, hence, state law was not relevant. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 404, 406, 21 U.S.C.A. §§ 841(a)(1), 844, 846.

38. Conspiracy ⇦47(1), 48.2(1)

Once existence of a conspiracy is established, only slight evidence is required to connect any defendant with it; hence, instruction that very little evidence is necessary to show that a particular defendant was part of the conspiracy was a correct statement of the law. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

39. Criminal Law ⇦775(2)

Requested alibi instruction was properly refused where none of the evidence revealed any alibi; had such instruction been given it would have been merely misleading and, in any event, even if defendant presented evidence of an alibi, it would not have rebutted the Government's evidence since presence need not be shown to prove conspiracy and evidence of extensive telephone calls between codefendants would have been sufficient. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

40. Criminal Law ⇦826

Under Rules of District Court for the District of Alaska, defendant's requested instructions were untimely where filed the very day that instructions were given; even if trial court erred in refusing to give requested instructions, the error would have been excusable in light of the tardiness. U.S. Dist.Ct.Rules Alaska, General Rule 15.

41. Criminal Law ⇦986

Whether trial judge considered defendant's allegedly perjured testimony in sentencing was irrelevant to validity of sentence imposed since a judge may consider the candor of the defendant on the stand in passing sentence.

42. Criminal Law ⇦1147

Court of Appeals will not review a sentence absent some extraordinary circumstance.

43. Criminal Law ⇐655(5), 1166.22(3)

Since jury had retired from courtroom when trial judge allegedly improperly commented that he found counsel's questions to be "marginally relevant" no prejudice was possible; in any event, trial judge is vested with power to comment fairly to the jury.

Appeal from the United States District Court for the District of Alaska.

Before CARTER, TRASK and KENNEDY, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

This is an appeal from jury convictions for distribution of a controlled substance (cocaine), in violation of 21 U.S.C. § 841(a)(1), and conspiracy to distribute a controlled substance, in violation of 21 U.S.C. § 846. Appellant Pederson was also convicted of possession of a controlled substance, in violation of 21 U.S.C. § 844.

Appellant Lustig has raised numerous contentions. In particular, he argues that the judge improperly dismissed a juror, that he should have been granted a continuance after he obtained new counsel, and that the testimony of his common law wife was received in violation of the marital privilege. Appellant

Pederson argues only that his right against self-incrimination was violated by being forced to answer certain questions on cross-examination.[1] Finding none of these claims meritorious, we affirm.

FACTS

Appellant Pederson met undercover police detective Bernard Lau on February 27, 1976, in order to sell him an ounce of cocaine. The meeting was arranged by Mike Tarnef, a local dealer turned informant. Prior to this meeting, Pederson picked up a small package (presumably containing the cocaine) from a man identified by four police officers as appellant Lustig. Pederson told Tarnef that his "man", or narcotics source, was Lustig.

After the February 27 meeting, Pederson told Lau that more drugs were available for purchase. Pederson telephoned Lustig immediately after this conversation. (Telephone records indicate extensive communications between Pederson and Lustig.) Lau gave Pederson and his wife (and co-defendant) Sherri Pederson some money the next day to buy the

1. Appellant Pederson does, however, adopt the arguments of Lustig on appeal, as is his right under Fed.R.App.P. 28(i).

drugs and to repay a debt Pederson said he had with his source. It was established that Pederson owed money to Lustig.

Prior to the second meeting with Lau, the Pedersons drove out to Lustig's home located in Wasilla. Their vehicle rendezvoused with another near Lustig's home and then returned to Anchorage. The Pedersons then went directly to the meeting with Lau and sold him another ounce of cocaine.

Appellants were arrested on March 11. Lustig was stopped near his home while driving a truck. It was searched for inventory purposes, and a "seal-a-meal" bagging machine later identified as the same used for packaging the cocaine sold to Lau was found.[2] The truck also contained an unused "seal-a-meal" bag and drug-weighing scales.

Lustig was informed of his rights and placed in a police car. Enroute to the federal marshal, the arresting officers found two ounces of cocaine in Lustig's possession. Lustig had attempted to

2. Experts testified that the "seal-a-meal" bag was a unique packaging method for cocaine. Tests conducted on the device found in Lustig's truck showed that it left a characteristic marking on the bags it sealed identical to that on the bags sold to Lau and to a bag found in Lustig's possession on the day of his arrest.

conceal this cocaine under the rear seat of the car.

Appellants were indicted (in a superseding indictment) on March 24. Lustig initially was represented by attorney William Fuld, who handled the arraignment proceedings and filed numerous pretrial motions on Lustig's behalf. The district court, informed that Lustig might attempt to post bond and then flee, froze Lustig's assets and restrained Lustig from disposing of his assets. In the meantime, Lustig was rearrested on a prior Alaskan drug offense on a petition to revoke probation and held without bail.[3]

Lustig obtained new counsel four days before the scheduled trial date. The court had urged Lustig, a month earlier, to finalize arrangements with an attorney to insure proper representation. The new counsel made an unsuccessful

3. Lustig characterizes himself as a "political activist who has incurred the wrath of the United States government." He was convicted in 1968 for possession and distribution of marijuana. He was peripherally involved in the litigation which ended with the Alaska Supreme Court declaring that possession of marijuana for personal use was constitutionally protected. *See Ravin v. State*, 537 P.2d 494 (Alas.1975). However, Lustig neither specifically argues nor makes out a claim of official harassment.

motion for a continuance, and then petitioned this court for a writ of mandamus or prohibition staying the trial in order to provide more preparation time. This petition was denied on April 26, 1976.

Trial began on April 27. After one day of testimony, the court informed counsel that one juror had been excused because he admitted prejudicial knowledge about the case. A motion for mistrial because of this excusal was denied.

Lustig testified in his own behalf. He said he felt it was an infringement on his liberty for the government to proscribe the use of cocaine. He admitted to possession of the drug, but said it was for his own use. He denied that the sealing machine and other paraphernalia belonged to him. Lustig also claimed that the police were mistaken in their identification of him as the supplier of the drugs to Pederson.

Pederson also testified in his own behalf. He admitted participating in the February 25 and March 4 transactions, but claimed entrapment. He denied that Lustig was the man who supplied him with the cocaine.

The government called Lustig's common law wife, Callie Newton, as a rebuttal witness. She testified there was a verbal agreement between Lustig and

Pederson to distribute cocaine. Lustig objected on the ground that this testimony violated his marital privilege. The district court allowed the testimony because Alaska law does not recognize the validity of common law marriage. Lustig claims that Newton's testimony was given because of a desire for revenge arising out of certain unrelated events. The defense sought a continuance during trial to subpoena an independent witness to establish Newton's improper motives. This request was denied.

After 12 hours of deliberations, the jury returned verdicts of guilty on all counts. Motions by Lustig for different verdict forms and for individual polling of jury members on each count were denied. Lustig was sentenced to nine years; Pederson received seven. This appeal followed.[4]

MOTIONS FOR CONTINUANCES

[1–7] Lustig was represented by at-

4. After Lustig was convicted and sentenced in this case, his probation was revoked for the prior Alaska offense and his original five-year sentence reinstated. Lustig's appeal in this other case is dealt with in a companion case filed in conjunction with this opinion. *See United States v. Lustig*, slip opin. 1277, —— F.2d —— (9 Cir. 1977).

torney Fuld from the time of his arrest until four days prior to trial. Fuld moved to withdraw as counsel two weeks after Lustig's arrest, claiming the period prescribed by the Speedy Trial Act made representation by anyone impossible. The district court denied Fuld's motion, but warned Lustig that he must either make final arrangements with Fuld or get another attorney for trial, then more than a month away. Lustig did not act on this advice until immediately before trial.

At that time, attorney Weidner became counsel of record. He asked for a continuance four days prior to trial. The court denied this motion. Lustig now claims that this failure to grant a continuance resulted in a deprivation of his right to the effective assistance of counsel of his choice. *See, e. g., Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Sanders v. Russell*, 401 F.2d 241, 247 (5 Cir. 1968).

Lustig had over a month to obtain a different attorney. He is a man of considerable means.[5] It is very unlikely that he would be unable to find willing counsel in the entire city of Anchorage (which has over 600 attorneys). More probably, he simply did not try very hard. *See Glenn v. United States*, 303

F.2d 536, 543 (5 Cir. 1962) (failure to obtain counsel was defendant's fault).

Lustig relies primarily on *Mardian v. United States*, 178 U.S.App.D.C. ——, 546 F.2d 973 (1977). In that case, the appellant had made a motion for severance two weeks into trial after his attorney unexpectedly became ill and was hospitalized. The circuit court found the denial of this motion to be reversible error, but only because appellant had earlier made a showing to the trial court of substantial prejudice resulting from a joint trial. There was a great disparity in the evidence against the appellant and his three co-defendants. *Id.* at 979–80.

These factors are absent here. The trial had not begun; Lustig had had ample time to obtain alternative counsel.

5. Lustig claims that the court-imposed freeze over his assets prevented him from hiring counsel. The court's order was for the limited purpose of insuring that Lustig did not flee. It would not have prevented payment of an attorney if a request had been made. Furthermore, Lustig's present counsel actually terminated his employment with the Anchorage Public Defenders' Office to become Lustig's attorney. One can only infer that some attractive consideration prompted this action. In addition, the attorney immediately rented an office, and hired a secretary, an investigator, a research assistant, and another attorney to work on the case. This hardly suggests either inadequate resources or representation.

There were no prejudicial factors involved such as the disparity in evidence. As the court in *Mardian* also observed, "[A] defendant's right to an attorney of his choice is not so absolute as to permit disruption of the fair and orderly administration of justice when another competent attorney is available to continue the defense." *Id.* at 979, n. 9. *See also Lofton v. Procunier*, 487 F.2d 434, 435 (9 Cir. 1973).

A trial court has wide discretion to grant or deny continuances. *Ungar v. Sarafite*, 376 U.S. 575, 591, 84 S.Ct. 841, 11 L.Ed.2d 921 (1963). Actual prejudice must be shown before a trial court's denial of a continuance will be reversed. *United States v. Harris*, 501 F.2d 1, 4–5 (9 Cir. 1974); *Daut v. United States*, 405 F.2d 312, 315 (9 Cir. 1968), *cert. denied*, 402 U.S. 945, 91 S.Ct. 1624, 29 L.Ed.2d 114 (1971). Moreover, a court must be wary against the "right of counsel" being used as a ploy to gain time or effect delay. *United States ex rel. Baskerville v. Deegan*, 428 F.2d 714, 716 (2 Cir. 1970).

This court may view the record to determine the adequacy of representation and possible prejudice from a denial of a continuance. *See United States v. Simmons*, 457 F.2d 763, 764 (9 Cir. 1972); *Torres v. United States*, 270 F.2d 252.

255 (9 Cir. 1959). And the record in this case reveals extensive and competent argument and cross-examination by Lustig's counsel—far more so, we might add, than for his co-defendant. Moreover, this case was relatively uncomplicated, with the government producing its evidence in just six hours.

It is arguable whether the district court should have granted Lustig's new attorney more time.[6] However, the failure to do so falls well short of an abuse of discretion.[7]

6. The record shows that the trial judge mistakenly believed he had no choice in the matter; he thought the Speedy Trial Act, 18 U.S.C. § 3164, rigidly required trial within 46 days after arrest. Ninety days from arrest to trial is allowed. Moreover, delays which are attributable to the defendant are not counted in this period. *United States v. Lemon*, 550 F.2d 467, 470 (9 Cir. 1977).

7. Lustig also argues that the court should have granted a continuance to enable him to call the witness who would establish that Newton was motivated by revenge. This request came after the defense rested its case, and thus cannot be said to be a product of anything except lack of due diligence. *See United States v. Harris*, 436 F.2d 775 (9 Cir. 1970). Moreover, the testimony would have been cumulative and marginally relevant. There was no error here either.

JUROR DISCHARGE

[8–11] Prior to the start of the second day of trial, Judge von der Heydt met with juror David Gransbury at Gransbury's request. Gransbury revealed that he possessed information about the case which made him believe that appellants were guilty. The judge examined Gransbury under oath, in chambers outside presence of counsel, and finally excused him from further duty. The first alternate was seated in his place in view of the defendants, pursuant to Fed.R.Crim.P. 24(c). Lustig's motion for an evidentiary hearing was denied.

Lustig argues that this excusal violated his right to be present at all critical stages of a proceeding. *See* Fed.R. Crim.P. 43. He cites numerous cases which point to the importance of the court not communicating ex parte with the jury. *See, e. g., United States v. Arrigada,* 451 F.2d 487, 488 (4 Cir. 1971); *Evans v. United States,* 284 F.2d 393 (6 Cir. 1960). Had juror Gransbury been retained, these cases might be applicable.[8]

It is well established that a judge may dismiss a juror for cause without a hearing. *See, e. g., United States v. Domenach,* 476 F.2d 1229, 1232 (2 Cir.), *cert. denied,* 414 U.S. 480, 94 S.Ct. 95, 38 L.Ed.2d 77 (1973) (dismissal of juror who was 10 minutes late); *United States v. Cameron,* 464 F.2d 333, 335 (7 Cir. 1972) (judge has discretion to remove juror who cannot perform duties). The court is not required to hold hearings on questions of fitness either; *in camera* inquiries are sufficient. *United States v. Crisona,* 416 F.2d 107, 119 (2 Cir. 1969).

This case is similar to *United States v. Houlihan,* 332 F.2d 8 (2 Cir.), *cert. denied,* 379 U.S. 828, 85 S.Ct. 56, 13 L.Ed.2d 37 (1964). There one of the jurors was a practical nurse employed by a heart patient who suffered a heart attack on the eighth day of trial. The juror informed the judge of these facts in his chambers without anyone else present. The judge excused the juror and later informed counsel of his action. Defendant argued on appeal that this

8. Appellant also contends that the excusal represented an improper ex parte communication of the court to the jury. But such a communication is necessarily implied by the judge's excusal (it would be difficult to excuse without communicating), and would not be prejudicial in any case because that juror no longer served. Moreover, communications by the judge far more prejudicial and less justified than this one have been found to be harmless error. *See, e. g., United States v. Goodman,* 457 F.2d 68 (9 Cir. 1972) (note from judge).

violated his Fifth and Sixth Amendment rights. The Second Circuit responded:

> "We conclude that defendants' rights were not violated. This circuit has previously held that it was not improper near the end of a trial for a judge to speak privately and off the record to a juror to convince him to remain on the jury after he had requested to be excused for reasons of personal hardship. *United States v. Woodner,* 317 F.2d 649, 652 (2d Cir.), *cert. denied,* 375 U.S. 903, 84 S.Ct. 192, 11 L.Ed.2d 144 (1963). As we said
>
> > 'we would hesitate to presume that prejudice resulted in the absence of some plain showing to that effect. * * * We have enough confidence in the integrity and fairness of the District Judges to assume that they will not make unfair remarks to jurors while undertaking administrative duties of this nature.'
>
> Certainly no greater prejudice can arise when as a result of the interview the juror is dismissed and, in the presence of the defendant and his attorney, an alternate is substituted. The *Woodner* decision is therefore controlling." 332 F.2d at 13 (citations omitted).

See also United States v. Zambito, 315 F.2d 266, 269 (9 Cir.), *cert. denied,* 373 U.S. 924, 83 S.Ct. 1524, 10 L.Ed.2d 423 (1963) (judge permitted to dismiss juror after disclosure in chambers of untruthful voir dire response).

Courts will not presume prejudice where the judge removes a juror. *United States v. Ellenbogen,* 365 F.2d 982, 989 (2 Cir.), *cert. denied,* 386 U.S. 923, 87 S.Ct. 892, 17 L.Ed.2d 795 (1966). Most of the cases cited by Lustig in which prejudice was found are ones in which the jury was retained, not excused. It is difficult to see what prejudice could result from placing an alternate juror, approved by the defendants, on the jury in place of a juror who cannot fairly perform his duties. The opposite would have been prejudicial.[9]

JURY POLL

[12, 13] After the verdict was announced, each juror was asked whether a

9. Lustig also contends that the excusal of a venireman who failed to take the oath prior to voir dire was prejudicial error. He bases this complaint on some vague religious grounds. This objection is frivolous. There is no indication that the venireman's failure to take the oath had anything to do with religious grounds. And even if it did, the excusal would not violate defendant's rights. *See Grech v. Wainwright,* 492 F.2d 747, 749 (5 Cir. 1974); *United States v. Dangler,* 422 F.2d 344, 345 (5 Cir. 1970).

true verdict had been announced. Each juror answered in the affirmative. Nonetheless, Lustig requested that the jury be polled as to each of the four counts, and now asserts that it was reversible error not to use this procedure. We disagree. To follow the procedure he now advocates would be needlessly repetitious.

Lustig would have a valid objection if one or more jury members expressed some uncertainty as to the verdict. *See, e. g., United States v. Edwards,* 469 F.2d 1362 (5 Cir. 1972). There was no uncertainty expressed here. Since jury polling is a matter of discretion for the court, *Shibley v. United States,* 237 F.2d 327, 334 (9 Cir.), *cert. denied,* 352 U.S. 873, 77 S.Ct. 94, 1 L.Ed.2d 77 (1956), there was no abuse of discretion in this case.

[14] Lustig also contends that the jury forms used were incomplete and erroneous. He wanted the court to use a form in which there was a place for each juror to sign after each count of the indictment. But he cites no authority for such a requirement other than one case in which such a form was used. *See Posey v. United States,* 416 F.2d 545, 553 (5 Cir. 1969). In fact, forms do not even have to be used. When they are,

any reasonable form will suffice. *See* 23A C.J.S. Criminal Law §§ 1393–95.

[15, 16] After the verdict was received, Lustig's counsel filed an affidavit alleging that a juror had repudiated the verdict. This affidavit purported to contain a statement of a juror given to a friend and then overheard by the affiant. The party who allegedly heard this statement is not revealed. The record does not reveal any uncertainty about or disagreement with the verdict by any juror.

Where no dissent or uncertainty is demonstrated in court, testimony will not be received from jurors or others regarding the verdict itself. *Stein v. New York,* 346 U.S. 156, 178, 73 S.Ct. 1077, 97 L.Ed. 1522 (1952); *Hyde v. United States,* 225 U.S. 347, 382–84, 32 S.Ct. 792, 56 L.Ed. 1114 (1911); *United States v. Stacey,* 475 F.2d 1119, 1121 (9 Cir. 1973). Lustig has shown no reason to vary from this general rule. Therefore, the argument is foreclosed.

SEARCH AND SEIZURE

[17] After Lustig was arrested, his vehicle was searched to make an inventory of its contents prior to impounding. This was done according to standard police procedure. *See* 13 A.A.C. § 02.375. During this inventory, the sealing ma-

chine and bags were found. These items were properly seized and used as evidence. *See South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (inventory searches and seizures valid). Probable cause was not required.

[18, 19] Lustig argues that the search warrant for his house was invalid because it did not contain sufficient information to be a "night time warrant". However, the search occurred at 9:00 P.M., an hour before the "night time" requirement begins. *See United States v. Woodring*, 444 F.2d 749, 751 (9 Cir. 1971). Moreover, the government did not introduce any fruits of that search during its case in chief.[10]

TESTIMONY OF COMMON LAW WIFE

[20–26] Lustig argues that the testi-

10. Lustig also claims that the use of his telephone records as evidence violated his right to privacy. It is well established that the "expectation of privacy" only extends to the content of telephone conversations, not to records that conversations took place. *United States v. Baxter*, 492 F.2d 150, 167 (9 Cir. 1973). *See also United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) (subpoena to bank custodian for checking accounts does not violate rights of defendant).

mony of Callie Newton, his common law wife of seven years, was received in violation of the privilege for marital communications.[11] This claim is governed by Rule 501 of the Federal Rules of Evidence, which provides in relevant part:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

See also Fed.R.Crim.P. 26, *as amended* (1972). We therefore turn to federal common law to decide Lustig's claim.

Federal courts recognize two distinct privileges arising out of the marital relationship. The first bars one spouse from testifying against the other. This privilege permits either spouse, upon objection, to exclude adverse testimony by the other. It is what remains of the old

11. We assume the existence of a marriage in accordance with common law principles. Lustig and Newton lived together for many years, had two children, and held themselves out to be husband and wife.

common law rule that a spouse was incompetent as a witness for or against the other spouse based on the legal fiction that husband and wife were one person. *See Hawkins v. United States,* 358 U.S. 74, 75–76, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958); *Bisno v. United States,* 299 F.2d 711, 721 (9 Cir.), *cert. denied,* 370 U.S. 952, 82 S.Ct. 1602, 8 L.Ed.2d 818 (1962). This is often referred to as the "anti-marital facts" privilege. *See, e. g., United States v. Smith,* 533 F.2d 1077, 1079 (8 Cir. 1976). *See generally* C. Wright, 2 Federal Practice and Procedure § 405, at 83–86 (1969).

The other privilege protects confidential marital communications. It bars testimony concerning intra-spousal, confidential expressions arising from the marital relationship. *See Blau v. United States,* 340 U.S. 332, 333, 71 S.Ct. 301, 95 L.Ed. 306 (1951); *United States v. Harper,* 450 F.2d 1032, 1045 (5 Cir. 1971). Unlike the "anti-marital facts" privilege, this privilege survives the termination of the marriage. *Pereira v. United States,* 347 U.S. 1, 6, 74 S.Ct. 358, 98 L.Ed. 435 (1954); *United States v. Lewis,* 140 U.S. App.D.C. 40, 433 F.2d 1146, 1150 (1970).

Neither privilege prevents the introduction of Newton's testimony. Both privileges depend on the existence of a

valid marriage, as determined by state law. *United States v. Apodaca,* 522 F.2d 568, 571 (10 Cir. 1975); *United States v. Neeley,* 475 F.2d 1136, 1137 (4 Cir. 1973); J. Wigmore, Evidence § 2230 (McNaughton ed. 1961). Common law marriage is not valid under Alaska law. A.S. 25.05.-011, 261, 311. Therefore, neither privilege applies in this case. *See, e. g., United States v. Boatwright,* 446 F.2d 913, 915 (5 Cir. 1971); *United States v. McElrath,* 377 F.2d 508, 510 (6 Cir. 1967).

Lustig argues, however, that the concept of equal protection compels this court to go beyond existing law and recognize that those married under the common law also are entitled to the marital privileges in federal court.[12] Even if we were to agree with this proposition, however, it would not aid Lustig's cause. The "anti-marital facts" privilege does not survive the termination of the marriage. *United States v. Smith, supra,* 533 F.2d at 1079; *United States v. Fish-*

12. Lustig bases his argument on the recognition of marriage as a fundamental right to which the equal protection clause extends. *See, e. g., Boddie v. Connecticut,* 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Skinner v. Oklahoma,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). He contends those married under the common law therefore deserve equal treatment under federal evidentiary standards as those married by statute.

er, 518 F.2d 836, 838 (2 Cir.), *cert. denied,* 423 U.S. 1033, 96 S.Ct. 565, 46 L.Ed.2d 407 (1972). The record reveals that the Lustig-Newton relationship had been terminated with no chance of reconciliation. The "anti-marital facts" privilege, even if it were held to apply, therefore would not operate.

The confidential marital communications privilege would be equally unhelpful because Newton's testimony concerned matters neither communicative nor confidential in nature. It is well established that the privilege applies only to utterances or expressions intended by one spouse to convey a message to the other. *Pereira v. United States, supra,* 347 U.S. at 6, 74 S.Ct. 358; *United States v. Smith, supra,* 533 F.2d at 1079. Most of Newton's testimony related her observations of Lustig engaging in drug transactions with third parties. These are not communications. *See, e. g., Wolfle v. United States,* 291 U.S. 7, 16–17, 54 S.Ct. 279, 78 L.Ed. 617 (1934); *United States v. Lewis, supra,* 433 F.2d at 1150–51.

Lustig argues that his acts should nonetheless be considered communicative. The privilege has not been extended this far. *See* C. McCormick, Evidence § 79, at 164 (2d ed. 1972). But even if it

were, the "communications" were not confidential. Communications made to or in the presence of third parties are not intended to be confidential and are not privileged. *Pereira v. United States, supra,* 347 U.S. at 6–7, 74 S.Ct. 358; *United States v. Burks,* 152 U.S.App.D.C. 284, 470 F.2d 432, 434 (1972).[13]

Accordingly, neither marital privilege would bar Newton's testimony even if it were applicable to the Lustig-Newton common law marriage. We therefore need not reach Lustig's equal protection argument to decide this issue. There was no error in admitting Newton's testimony.[14]

CROSS-EXAMINATION

[27, 28] Lustig argues that the district court erroneously curtailed his

13. Acts do not become privileged communications simply by being done in the presence of a spouse.

14. Lustig also contends that the testimony of Newton violated the court's sequestration order. But Lustig fails to cite any portions of testimony in support of this contention or to explain how the order was violated. Moreover, the district court had discretion to receive this testimony in any event. *See Holder v. United States,* 150 U.S. 91, 92, 14 S.Ct. 10, 37 L.Ed. 90 (1893); *United States v. Cozzetti,* 441 F.2d 344, 349–50 (9 Cir. 1971).

cross-examination of the informant Tarnef. He sought to examine Tarnef regarding his possible involvement in several criminal activities. He also wanted to inquire whether Tarnef had charges pending against him. Such inquiries would have been for the sole purpose of attacking Tarnef's credibility.

The extent of impeachment is committed to the discretion of the trial court. Fed.R.Evid. 608(b). The court must determine whether the probative value of the evidence is outweighed by the danger of confusion, prejudice, or waste of time. Fed.R.Evid. 403. The court's determination will not be reversed without a showing of an abuse of discretion. *United States v. Phillips,* 482 F.2d 1355, 1357 (9 Cir. 1973); *United States v. Haili,* 443 F.2d 1295, 1299 (9 Cir. 1971).

Here Lustig was able to make a broad inquiry into the witness' credibility and possible bias. He asked Tarnef about his agreement with Anchorage police and whether he had received any termination of probation or parole as a result of his testimony. He also asked about Tarnef's prior convictions, the nature of his heroin habit, and whether he had lied in other proceedings. In short, there was ample cross-examination permitted on this collateral matter. *See United States v. Allende,* 486 F.2d 1351, 1354 (9

Cir. 1973), *cert. denied,* 416 U.S. 958, 94 S.Ct. 1973, 40 L.Ed.2d 308 (1974); *United States v. Norman,* 402 F.2d 73, 77 (9 Cir. 1968); *Enciso v. United States,* 370 F.2d 749, 751 (9 Cir. 1967).

[29] Lustig also complains about the limitations placed on his cross-examination of officers Lau and Jones, and Callie Newton. Yet the record reveals that the court permitted examination into areas it did not have to. For example, Lau was asked whether he was being paid as a witness; Newton was asked why she had sued Lustig and whether she was involved in drug dealing. The record shows that Lustig's counsel often strayed from relevancy in his exhaustive questioning. It was not error for the court to lead him back to it.

PRETRIAL IDENTIFICATION

[30] Lustig argues that the pretrial photographic identification procedures used were impermissibly suggestive in violation of *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The officers were shown four or five photographs without name identification or suggestion as to which one was Lustig. This identification procedure occurred two hours after the cocaine sale. Both officers identified Lustig. Nothing in the procedure itself dis-

closes the suggestiveness disapproved by *Simmons*.

Lustig suggests that the 30 seconds to one minute which Detective Lau had to view the suspect was inadequate for later identification. But periods shorter than this have been deemed adequate. *See, e. g., United States v. Kimbrough,* 528 F.2d 1242, 1243–47 (7 Cir. 1976) (30 seconds); *United States ex rel. Pella v. Reid,* 527 F.2d 380, 385 (2 Cir. 1975) (10–15 seconds). Detective Lau obviously was a good witness in terms of his likely ability to observe and remember the scene. His identification was verified by that of three other persons who saw Lustig for longer periods. There also was substantial corroborative evidence supporting the conviction. *See United States v. Schoore,* 449 F.2d 348, 349 (9 Cir.), *cert. denied,* 405 U.S. 1018, 92 S.Ct. 1299, 31 L.Ed.2d 481 (1971); *United States v. Stinson,* 422 F.2d 356, 357 (9 Cir. 1969).

STATEMENT BY LUSTIG

[31] Lustig objects to the introduction into evidence of the statement "you are not going to pin that on me" made after police discovered a bag of cocaine in the police car near Lustig after his arrest. (This statement was admitted to show that Lustig knew that the bag contained cocaine.) The evidence shows that Lustig was advised of his rights immediately upon arrest. Lustig's statement was made several minutes after this time. Therefore, this evidence was admissible.[15]

CROSS–EXAMINATION OF PEDERSON

[32, 33] Pederson took the stand to advance his defense of entrapment. He now claims that he was denied his right against self-incrimination because he was compelled to tell from whom he had obtained the drugs. Since he failed to identify Lustig as his source, and yet Lustig was convicted, the argument goes, Pederson lost his credibility with the jury and thereby was incriminated.

Prior to the government's cross-examination, counsel for Lustig asked Pederson about any meetings or dealings between co-defendants. This line of inquiry was therefore opened before the government began its examination. The government was simply pursuing it. A defendant has no right to give testimony without laying himself open to cross-examination upon that testimony. *Brown*

15. So too were various statements made by Lustig at the time of booking.

v. *United States,* 356 U.S. 148, 155, 78 S.Ct. 622, 2 L.Ed.2d 589 (1957).

Since Pederson raised the defense of entrapment, the prosecution was permitted to conduct a "searching inquiry" into the possible predisposition of the defendant. *United States v. Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 1046 (1973). This inquiry necessarily includes the defendant's knowledge of and connections with his co-defendant, since evidence of conspiratorial activity would refute a theory of entrapment. The government's cross-examination was proper.

COCAINE

[34] Lustig raises several familiar arguments regarding the controlled substance cocaine. He first argues that the failure to republish the schedules listing cocaine as a controlled substance is fatal to the indictment. This contention is disposed of by *United States v. Eddy,* 549 F.2d 108 (9 Cir. 1976) (no need for annual republication under statute).

[35] Lustig next argues that the trial court erred by not hearing evidence about the pharmacological nature of cocaine. *See United States v. Foss,* 501 F.2d 572 (1 Cir. 1974). The record shows, however, that Lustig presented

detailed motions to the court discussing the nature of cocaine. It would have been a waste of time for the court to hear extensive testimony on this marginal issue.

[36] Lustig finally argues that cocaine is improperly classified as a controlled substance, since it is relatively harmless. Beyond the fact that the evidence is sharply divided about cocaine, this court has recently rejected a similar contention regarding marijuana—a substance far less dangerous and controversial than cocaine. *See United States v. Rogers,* 549 F.2d 107 (9 Cir. 1976).

PROSECUTION IN FEDERAL COURT

[37] Lustig claims that prosecutors improperly "forum-shopped" for the best court in which to obtain a conviction against him. Of course, cooperation between state and federal officers often occurs, with prosecution through one court system or the other. When in federal court, federal law and procedures apply. Therefore, Alaska law is not relevant. *Elkins v. United States,* 364 U.S. 206, 224, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1959). A federal warrant was obtained for Lustig's arrest, who never was indicted by the state. Moreover, numerous cases have involved similar procedural

histories as this one and have been affirmed on appeal. *See, e. g., United States v. Harrington,* 504 F.2d 130 (7 Cir. 1974); *United States v. Sellers,* 483 F.2d 37 (5 Cir.), *cert. denied,* 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212 (1973).

JURY INSTRUCTIONS

[38] Lustig complains about several jury instructions. First he argues that the conspiracy instruction informing the jury that "very little evidence is necessary to show that a particular defendant was part" of the conspiracy was erroneous. However, it is well established that once the existence of a conspiracy is established, only *slight* evidence is required to connect any defendant with it. *United States v. Freie,* 545 F.2d 1217, 1221 (9 Cir. 1976); *United States v. Westover,* 511 F.2d 1154, 1157 (9 Cir. 1975). Thus, the contested instruction correctly states the law.

[39] Lustig also requested an alibi instruction and claims that the failure to give it was error. None of the evidence shows any "alibi" and thus the court did not have to give what would have been a misleading instruction in this case. *See United States v. Dye,* 508 F.2d 1226, 1231 (6 Cir. 1974); *United States v. Cole,* 453 F.2d 902, 906 (8 Cir. 1972). However, even if Lustig had presented evidence of an alibi, it would not have rebutted the government's evidence. Presence need not be shown to prove conspiracy. *United States v. Lee,* 483 F.2d 968, 970 (5 Cir. 1973). Here the evidence of extensive telephone calls between Pederson and Lustig would have been sufficient.

[40] Lustig's other complaints about the jury instructions are frivolous. They also have to be considered against the fact that Lustig's own requested instructions were untimely. Rule 15 of the Rules of the United States District Court for the District of Alaska provides for submission of proposed instructions five days prior to trial. Lustig's instructions were filed the very day that instructions were given. Even if the court had erred, which it did not, the error would have been excusable in light of this tardiness. *See United States v. Tourine,* 428 F.2d 865, 869 (2 Cir.), *cert. denied,* 400 U.S. 1020, 91 S.Ct. 581, 27 L.Ed.2d 631 (1970).

COMMENTS OF PROSECUTOR AND JUDGE

[41, 42] Lustig complains about a comment of the prosecuting attorney, after the verdict, in which he said that the evidence indicated Lustig perjured him-

self when he testified in his own defense. The trial judge may or may not have considered Lustig's testimony in sentencing. It does not matter. A judge may consider the candor of the defendant on the stand in passing sentence. *United States v. Cluchette,* 465 F.2d 749, 754 (9 Cir. 1972). As we have so often held, this court will not review a sentence absent some extraordinary circumstance. *United States v. Buck,* 548 F.2d 871, 877 (9 Cir. 1977). No such circumstance exists here.

[43] Lustig also suggests that the trial judge improperly commented that he found counsel's questions to be "marginally relevant." But the jury had already retired from the courtroom when this statement was made. No prejudice was possible. In any event, the trial judge is vested with power to comment fairly to the jury. *Duke v. United States,* 255 F.2d 721, 728 (9 Cir. 1958).

SUFFICIENCY OF THE EVIDENCE

Lustig argues that the district court erred in not granting a directed verdict on the conspiracy charge because of a lack of evidence. The record shows that the evidence against Lustig was considerable, and far in excess of what has been found by this court to be sufficient.

See, e. g., United States v. Robinson, 546 F.2d 309, 314 (9 Cir. 1976); *United States v. Freie, supra,* 545 F.2d at 1222.

CONCLUSION

The judgments of the district court are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 76-2661
GEORGE H. LUSTIG, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 76-3146
GEORGE H. LUSTIG,
Defendant-Appellants.

ORDER

Before: CARTER, TRASK and KENNEDY, Circuit Judges.

The panels in the above entitled cases have voted in each case to deny the petition of defendant-appellant Lustig for rehearing. Judges Trask and Kennedy in each case have voted to reject the suggestion for rehearing en banc of defendant-appellant Lustig, and Judge Carter so recommends.

The petitions for rehearing and suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for a rehearing en banc,

IT IS ORDERED that the petition for rehearing in each case is DENIED, and the suggestion for rehearing en banc in each case is REJECTED.

APPENDIX B — INDICTMENT AND MINUTE ORDERS AND WRITTEN MEMORANDUM ORDERS OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATE OF AMERICA,
Plaintiff,
v.
GEORGE H. LUSTIG; GREGORY D. PEDERSON; CHERYL RAE SMITH a/k/a Sherri L. Pederson,
Defendants.

Crim. No. A76-51

Violation of 21 U.S.C. §841(a)(1)
COUNTS I, II, III & IV — DISTRIBUTION OF CONTROLLED SUBSTANCE
Violation of 21 U.S.C. §844
COUNT V — POSSESSION OF CONTROLLED SUBSTANCE
Violation of 21 U.S.C. §846
COUNT VI — CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCE

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about February 27, 1976, in the District of Alaska, GEORGE H. LUSTIG knowingly and intentionally did distribute to GREGORY D. PEDERSON approximately 25 grams of cocaine, a Schedule II controlled substance and narcotic

drug, in violation of Title 21, United States Code, Section 841 (a)(1).

COUNT II

On or about February 27, 1976, in the District of Alaska GREGORY D. PEDERSON knowingly and intentionally did distribute approximately 25 grams of cocaine, a Schedule II controlled substance and narcotic drug, in violation of Title 21, United States Code, Section 841 (a)(1).

COUNT III

On or about March 4, 1976, in the District of Alaska, GREGORY D. PEDERSON and CHERYL RAE SMITH a/k/a Sherri L. Pederson did knowingly and intentionally distribute approximately 22.4 grams of cocaine, a Schedule II controlled substance and narcotic drug in violation of Title 21, United States Code, Section 841(a)(1).

COUNT IV

On or about March 10, 1976, in the District of Alaska, GEORGE H. LUSTIG knowingly and intentionally did possess with intent to distribute approximately 55 grams of cocaine, a Schedule II controlled substance and narcotic drug having a purity of approximately 36%, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT V

On or about March 10, 1976, in the District of Alaska, GEORGE H. LUSTIG knowingly and intentionally did possess in a small bone vial approximately 317 milligrams of cocaine, a Schedule II controlled substance and narcotic drug having a purity of approximately 100%, in violation of Title 21, United States Code, Section 844.

COUNT VI

Commencing at a time presently unknown to the Grand Jury and continuing through the period of February 27, 1976, to

March 5, 1976, in the District of Alaska, GEORGE H. LUSTIG, GREGORY D. PEDERSON and CHERYL RAE SMITH a/k/a Sherri L. Pederson, the defendants herein, did wilfully and knowingly combine, conspire, confederate and agree together, with each other and divers other persons whose names are to the Grand Jury unknown, to distribute and possess with intent to distribute controlled substances in violation of Section 841 (a)(1) of Title 21 of the United States Code, all of which is contrary to and in violation of Title 21, United States Code, Section 846.

A TRUE BILL.

_____

GRAND JURY FOREMAN

G. KENT EDWARDS
United States Attorney

By: _____
U.S. Attorney

DATED: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE H. LUSTIG; GREGORY D. PEDERSON; CHERYL RAE SMITH aka SHERRI L. PEDERSON,

Defendants.

No. A76-51 Cr.

ORDER

THIS CAUSE comes before the court on various motions. Having considered said motions and the legal memoranda filed,

IT IS ORDERED:

1. THAT Lustig's motion for a bill of particulars filed March 23, 1976, is denied as being now moot.

2. THAT Lustig's motion for a bill of particulars, filed March 31, 1976, is denied in light of the government's partial compliance and the authorities cited in opposition to additional compliance;

3. THAT Lustig's motion for severance and separate trials filed March 23, 1976, is denied for the reasons set forth in the government's opposition, particularly Lustig's failure to establish the necessary factual predicate for such motions, *see*, *United States v. Amidzich*, 396 F. Supp. 1140, 1144 (E. D. Wis. 1975);

4. THAT Lustig's motion to dismiss the conspiracy count, Count VI of the superceding indictment is denied for the reason that the government need not set forth any overt acts in furtherance of the conspiracy, *United States v. Miller*, 387 F. Supp. 1097 (D. Conn. 1975); *United States v. DeViteri*, 350 F. Supp. 550 (E. D. N. Y. 1972);

5. THAT Lustig's motion to dismiss the indictment on the grounds that cocaine is not properly classified is denied, *United States v. Marshall*, Slip Op. No. 74-3038, March 24, 1976 (9th Cir.); *United States v. Amidzich*, 396 F. Supp. 1140, 1147 (E. D. Wis. 1975) and the cases cited therein;

6. THAT Lustig's motion to dismiss the indictment on the grounds that the Attorney General of the United States has not complied with sections 811 and 812 of Title 21 is denied for the reason that the schedules have been republished in the Code of Federal Regulations, 21 CFR §1308.12, on April 1, 1975, which is part of the Federal Register, 44 USC 1510;

7. THAT Lustig's motion for inspection and examination is granted;

8. THAT counsel for Lustig and the United States Attorney or an Assistant United States Attorney confer with one another on or before April 19, 1976, to agree upon a method by which such an examination may be accomplished;

9. THAT Lustig's motion to suppress is denied for a failure to establish any factual or legal foundation;

10. THAT Lustig's motion for a continuance or change of place of trial is denied;

11. THAT Pederson's motion for discovery [and] inspection, filed March 30, 1976, is granted as to items numbered 2, 6, and 7, but denied as to the remainder thereof except that item number 1 is granted as to any statements made by defendant Pederson;

12. THAT Pederson shall comply with the government's request for discovery and inspection filed April 5, 1976, as

soon as the government complies with paragraph 11 of this order;

13. THAT Pederson's motion to dismiss the indictment is denied for the reasons set forth in paragraph 6 of this order;

14. THAT Pederson's motion for a continuance is denied;

15. THAT Smith's motion for discovery, filed April 6, 1976, is granted as to items numbered 2 and 3, but denied as to the remainder thereof, except that item number 1 is granted as to any statements made by defendant Smith;

16. THAT Smith shall comply with the government's request for discovery and inspection filed April 5, 1976, as soon as the government complies with paragraph 15 of this order;

17. THAT Smith's motion for bill of particulars and for discovery, filed April 6, 1976, is granted as to item b and denied as to the remainder thereof since no appropriate authorities were cited in support of said motion.

DATED at Anchorage, Alaska, this 16th day of April, 1976.

United States District Judge

cc: U.S. Attorney
William H. Fuld
F. P. Pettyjohn
Ron West

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA v. GEORGE LUSTIG
No. A76-51 Cr.

THE HONORABLE JAMES A. VON DER HEYDT

Deputy Clerk	*Reporter*
_____ Jim Meyers	__xx__ Dolores Runner
__xx__ Jeri Whitaker	_____ Mary Krogstad
_____ Jan Nelson	_____ Sandra Shorey

APPEARANCES: Plaintiff: G. Kent Edwards, U.S. Attorney
Defendant: Phillip Weidner

PROCEEDINGS:

At 3:35 p.m. court reconvened.

Defendant's Motion for continuance denied.

Entry of appearance of Phillip Weidner to be filed, and entered.

Motion for substitution of counsel denied.

Motion for stay pending review denied.

Motion to suppress denied.

Motion to reveal any promises of favorable treatment to witnesses for the government denied.

Motion for preservation denied.

Motion for protective order denied.

Motion to reveal exculpatory evidence denied.

Motion for relief from prejudicial joinder denied.

Motion for relief from prejudicial joinder of offenses denied.

At 3:45 p.m. court recessed.

cc: Phillip Weidner
William Fuld
Frederick Pettyjohn
U. S. Attorney

APPENDIX C (CONTAINS CONSTITUTIONAL PROVISIONS, STATUTES, RULES, REGULATIONS).

A) TEXT OF AMENDMENTS TO THE U.S. CONSTITUTION

AMENDMENT [I]

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT [IV]

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT [V]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT [VI]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

ARTICLE XIV

1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdicton the equal protection of the laws.

B) ALASKA CONSTITUTION

ARTICLE I

DECLARATION OF RIGHTS

Section 1. Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal rights opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Section 9. Jeopardy and Self-Incrimination. No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

Section 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in

courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 14. Searches and Seizures. The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Section 22. *Right of Privacy.* The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

C) FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in the response to the summons, a warrant shall issue.

RULE 31. VERDICT

(a) *Return.* The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) *Several Defendants.* If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) *Poll of Jury.* When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(e) *Criminal Forfeiture.* If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

As amended Apr. 24, 1972, eff. Oct. 1, 1972.

RULE 43. PRESENCE OF THE DEFENDANT

(a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived

his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) *Presence Not Required.* A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub. L. 94-62, Section 3 (35), 89 Stat. 376.

RULE 26. Taking of Testimony

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

Amended Nov. 20, 1972.

D) Canons of Judicial Ethics

Canon of Judicial Ethics No. 22

"Review. In order that a litigant may secure the full benefit of the right or review accorded to him by law, a trail judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure in this

regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable."

E) Federal Rules of Evidence

Article V. Privileges, Rule 501, *General Rule*

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to Statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Article VI. Witnesses, Rule 603, *Oath or Affirmation*

"Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

Article VI. Witnesses, Rule 605, *Competency of Judge as Witness*

"The Judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

F) SPEEDY TRIAL ACT INTERIM LIMITS 18 U.S.C. 3164

Section 3164. *Interim limits*

(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective,

each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

(1) detained persons who are being held in detention solely because they are awaiting trial, and

(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

(b) During the period such plan is in effect, the trial of any person who falls within subsection (a) (1) or (a) (2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

(d) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under his title to insure that he shall appear at trial as required.

— UNITED STATES STATUTES

Sec. 841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Sec. 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(H) — ALASKA STATUTES

Sec. 25.05.011. Civil contract. (a) Marriage is a civil contract requiring both a license and solemnization which may be entered into by

(1) a male who is 21 years of age or older with a female who is 18 years of age or older, who are otherwise capable, of

(2) those who qualify for a license under Sec. 171 of this chapter.

(b) No person may be joined in marriage in this state until a license has been obtained for that purpose as provided in this chapter. No marriage performed in this state is valid without solemnization as provided in this chapter.

Sec. 25.05.261. Who may solemnize. (a) Marriages may be solemnized

(1) by a minister, priest or rabbi of any church or congregation in the state, or by a commissioned officer of the Salvation Army, or by the principal officer or elder of

recognized churches or congregations which traditionally do not have regular ministers, priests, or rabbis, anywhere within the state;

(2) by a marriage commissioner or judicial officer of the state anywhere within his jurisdiction; or

(3) before or in any religious organization or congregation according to the established ritual or form commonly practiced therein.

(b) No provision of this section shall be construed to waive the requirements for obtaining a marriage license.

Sec. 25.05.311. Marriage without solemnization. A marriage contracted after January 1, 1964, is void unless the marriage has been solemnized as provided in this chapter. If the parties to a marriage void for failure to solemnize the marriage validate the marriage by complying with the requirements of this chapter, the issue of the void marriage are legitimate.

(I) ALASKA REGULATORY PROVISIONS

13 AAC 02.350. *Custody of Vehicle When Operator is Arrested.*

When a police officer arrests and detains the operator of a motor vehicle, the officer shall impound and remove the vehicle to a place of safety; however, the operator may elect to have another immediately available person who is legally licensed to operate a motor vehicle, drive or otherwise remove the vehicle as the operator directs. The operator may designate the nearest available garage or tow car operator of his choosing to remove the vehicle. If the operator does not so indicate, the officer shall make the arrangements necessary to remove the vehicle.

13 AAC 02.375. *Inventory of Impounded Vehicle.*

A police officer who impounds a vehicle for any reason provided by statute, ordinance or regulation shall conduct a complete inventory of the propery in the vehicle at the time of impoundment or as soon after as practicable. The inventory shall be signed by the person to whom the vehicle is released at the time of release.